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2. Strengthen [illegible]

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HORNBOOK CASE SERIES

ILLUSTRATIVE CASES

ON THE LAW OF

BILLS AND NOTES

By WM. UNDERHILL MOORE
Professor of Law
University of Wisconsin Law School

A COMPANION BOOK
TO
NORTON ON BILLS AND NOTES (4th Ed.)

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TABLE OF CONTENTS

PURCHASER FOR VALUE WITHOUT NOTICE

PRESENTMENT AND NOTICE OF DISHONOR

CHECKS

TABLE OF CASES

†

HORNBOOK CASES

ON

BILLS AND NOTES

INTRODUCTION

I. Distinction Between Assignability and Negotiability [1]

PEACOCK v. RHODES.

(Court of King's Bench, 1781. 2 Doug. 633.)

In an action upon an inland bill of exchange, which was tried before Willes, Justice, at the last Spring Assizes for Yorkshire, a verdict, by consent, was found for the plaintiff, subject to the opinion of the court on a special case, stating the following facts:

"The bill was drawn at Halifax, on the 9th of August, 1780, by the defendants, upon Smith, Payne & Smith, payable to William Ingham, or order, 31 days after date, for value received. It was indorsed by William Ingham, and was presented by the plaintiff for acceptance and payment, but both were refused, of which due notice was given by the plaintiff to the defendants, and the money demanded of the defendants. The plaintiff, who was a mercer at Scarborough, received the bill from a man not known, who called himself William Brown, and, by that name, indorsed the bill to the plaintiff, of whom he bought cloth, and other articles in the way of the plaintiff's trade as a mercer, in his shop at Scarborough, and paid him that bill, the value whereof the plaintiff gave to the buyer in cloth and other articles, and cash, and small bills. The plaintiff did not know the defendants, but had before, in his shop, received bills drawn by them, which were duly paid. William Ingham, to whom the bill was payable, indorsed it; John Daltry received it from him, and indorsed it; Joseph Fisher, received it from John Daltry; and it was stolen from Joseph Fisher, at York, (without any indorsement or transfer thereof by him,) along with other bills in his pocket-book, whereof his pocket was picked, before the plaintiff took it in payment as aforesaid. The plaintiff declared as indorsee of Ingham." [2]

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 2–7.

[2] The arguments of counsel are omitted.

Lord MANSFIELD. I am glad this question was saved, not for any difficulty there is in the case, but because it is important that general commercial points should be publicly decided. The holder of a bill of exchange, or promissory note, is not to be considered in the light of an assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject. If this rule applied to bills and promissory notes, it would stop their currency. The law is settled, that a holder, coming fairly by a bill or note, has nothing to do with the transaction between the original parties; unless, perhaps, in the single case, (which is a hard one, but has been determined,) of a note for money won at play. Vide Lowe v. Waller, T. 21 Geo. III, 2 Doug. 736. I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of mala fides was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and, therefore, the case is clear, and within the principle of all those Mr. Wood has cited, from that of Miller v. Race, 1 Burrows, 452, downwards, to that determined by me at nisi prius.

The postea to be delivered to the plaintiff.

BARROW v. BISPHAM.

(Supreme Court of New Jersey, 1829. 11 N. J. Law, 110.)

FORD, J.[3] The defendant moves to set aside a judgment entered against him in this case, on bond and warrant of attorney, upon an allegation that the bond was obtained from him by fraud, and for a consideration that has failed. The bond and warrant were give originally to Benjamin McGinnis, and assigned by him to James Barrow, the plaintiff. * * *

The counsel for the plaintiff insists that no fraud between the original parties can be set up against James Barrow, the assignee, who became a bona fide holder, without notice, for valuable consideration, and against whom no fraud is proved or imputed. In support of this doctrine, he cites Somes v. Brewer, 2 Pick. (Mass.) 184, 13 Am. Dec. 406, Fletcher v. Peck, 6 Cranch, 133, 3 L. Ed. 162, and Parker v. Patrick, 5 Term R. 175. The two former cases, instead of relating to bonds, or to a chose in action, refer exclusively to transfers of real estate. If one obtain a deed for land by fraud and imposition on the owner, and afterwards convey the same to a purchaser, having no notice of the fraud,

[3] Only a portion of the opinion is printed.

such purchaser will hold against the original owner. The reason of those cases is that the title to land, which passes by solemn livery of seisin or conveyances amounting to it, would be universally endangered, if fraud might be set up in any remote link of a long chain of title (or succession of owners), through whom it had passed in coming to the last purchaser. The cases have nothing to do with the assignment of a chose in action, which is governed by widely different rules. The case of Parker v. Patrick, only shows that goods, taken by a pawnbroker in the way of his trade, in market overt, and for valuable consideration, cannot be recovered back by the former owner; from whom they were not stolen, but obtained by false pretences. By the common law goods are assignable, but bonds are not; and all reasoning from one to the other is necessarily fallacious. The law touching the assignment of bonds, and the rights of an assignee, is settled by a multitude of cases. Thus in 1 Eq. Ca. Ab. 44, pl. 4, it is laid down, that an assignee of a bond must take it subject to the same equity that it is in the hands of the obligee. In Davis v. Austin, 1 Ves. Jr. 247, the Lord Chancellor says: "A purchaser of a chose in action must always abide by the case of the person from whom he buys, that I take to be an universal rule." In Wheeler v. Hughes, 1 Dall. 23, 1 L. Ed. 20, the court says the assignee of a bond takes it at his own peril, and stands in the same place as the obligee, so as to let in every defalcation which the obligor had against the obligee at the time of the assignment or notice of it. Rundle v. Ettwein, 2 Yeates (Pa.) 23, is to the same effect. So in Clute v. Robison, 2 Johns. (N. Y.) 595. Clute gave a bond for $1,200 to Rawlins, and took back a separate agreement that the bond should be surrendered up on his performing certain conditions. Rawlins assigned the bond to Robison. Kent, Chancellor, said: "There can be no doubt that Robison took his assignment subject to all equities which attached to it in the hands of Rawlins." Our statute, Rev. Laws, 305, making bonds assignable and enabling assignees to sue in their own names, instead of shaking this doctrine, serves to confirm it; it allows all just set-offs and discounts prior to the assignment. In the case of Garretsie v. Van Ness, 2 N. J. Law, 23, 2 Am. Dec. 333, this court decided that the assignment of a bond transferred no more interest than the assignor had in it at the time. Hence it appears that every defence is open against James Barrow the assignee, that the defendant could have had against Benjamin McGinnis. * * *

II. Indicia of Negotiability—Nonnegotiable Bills and Notes [4]

SMITH v. KENDALL.

(Court of King's Bench, 1794. 6 Term R. 123.)

Assumpsit for money paid by the plaintiff to the use of the testator, money lent to him, and on an account stated with the testator and another with the executor. The defendant pleaded the statute of limitations; to this the plaintiff replied that the latitat was sued out on the 26th of September 1793, and that the cause of action accrued within 6 years before that time; on which issue was taken.

On the trial before Lord Kenyon the plaintiff gave the following note in evidence: "Three months after date I promise to pay to Mr. Smith, Currier, £40 value received in trust for Mrs. E. Thompson, as witness my hand. L. Askew, 25 June 1787." The defendant objected, 1st. That this note was only evidence of money lent or paid by Mrs. Thompson and not by the plaintiff to the testator; and 2dly, that this was not a promissory note within the statute, and if not, that the cause of action accrued on the 25th of September 1787, three months after the date of the note, and consequently that 6 years had elapsed before the suing out of the writ. The plaintiff answered that as the note was payable to him, it was more proper to bring the action in his name than in that of Mrs. Thompson, and that the money when recovered by him would be recovered for her use; and in answer to the second objection, that this was a promissory note within the statute, in which case three days were allowed; and of course that six years had not expired when the latitat was sued out. A verdict was taken for the defendant, leave being given to the plaintiff to move to set that verdict aside, and to enter a verdict for him, if this court thought he was entitled to recover.

A motion was accordingly made for that purpose.[5]

Lord KENYON, C. J., said: If this were res integra, and there were no decision upon the subject, there would be a great deal of weight in the defendant's objection: but it was decided in a case in Lord Raymond (2 Ld. Raym. 1545) on demurrer, that a note payable to B. without adding or to his order, or to bearer, was a legal note within the act of Parliament. It is also said in Marius that a note may be made payable either to A. or bearer, A. or order, or to A. only. In addition to these authorities I have made enquiries among different merchants respecting the practice in allowing the three days grace, the result of which is that the Bank of England and the merchants in London allow the three days grace on notes like the present. The opinion of merchants indeed would not govern this court in a question of law, but I

[4] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 8, 9.

[5] Arguments of counsel are omitted.

am glad to find that the practice of the commercial world coincides with the decision of a court of law. Therefore I think that it would be dangerous now to shake that practice, which is warranted by a solemn decision of this court, by any speculative reasoning upon the subject; and consequently this rule must be made absolute to enter a verdict for the plaintiff.

Rule absolute.

JARVIS v. WILSON.

(Supreme Court of Errors of Connecticut, 1878. 46 Conn. 90, 33 Am. Rep. 18.)

Assumpsit against the defendant as acceptor of an order drawn on him in favor of the plaintiff, brought to the court of common pleas of Hartford county, and tried to the court on the general issue before McManus, J. Facts found and judgment rendered for the plaintiff. Motion in error by the defendant. The case is fully stated in the opinion.

LOOMIS, J. On the 8th of July, 1874, one William Murphy owed the plaintiff $189.20, and drew his order on the defendant in favor of the plaintiff in writing as follows:

"Mr. A. M. Wilson: Please pay Joseph Jarvis one hundred and eighty-nine dollars and twenty cents, and charge the same to me.

"William Murphy."

Murphy, who was then and had been for some time in the employ of the defendant, had been authorized by the latter to draw orders in favor of his workmen, of whom the defendant knew the plaintiff to be one.

The above order was duly presented for acceptance to the defendant on the same day that it was given, and the defendant said it was good, and verbally promised to pay it. It afterwards appeared that there was in fact due from the defendant to the drawer only $144.94, and thereupon the defendant refused to pay the plaintiff as he had before agreed. The court below upon these facts held the defendant liable for the full amount of the order. We think the judgment must stand against all the objections urged in behalf of the defendant.

The defendant claims, in limine, that his undertaking cannot be regarded as subject to the rules applicable to bills of exchange, but must be treated as a mere promise to pay money. But we do not see why it does not contain every essential element of the most approved definition of a bill of exchange. It is a written order from Murphy, addressed to the defendant, requesting him to pay the plaintiff a certain sum of money therein named. 1 Bouvier's Law Dict., Bill of Exchange; Byles on Bills, 57; Story on Bills, §§ 3, 37, 40; Edwards on Bills and Notes, 150; Eastern R. R. Co. v. Benedict, 15 Gray (Mass.) 292; Kendall v. Galvin, 15 Me. 131, 32 Am. Dec. 141; Michigan Ins. Co. v. Leavenworth, 30 Vt. 12.

But conceding the order to be a bill of exchange, the defendant further claims that he is not liable, because his acceptance was only by parol, when it should have been in writing.

It is true, as a general rule, that to make one liable as a party to a bill or note his name should appear thereon under his own hand or that of his agent. A wise policy may also require that the liability of an acceptor should not depend on parol evidence, and, recognizing this, some states have already changed the rule of the common law as to an acceptor of a bill of exchange. In New York it is required by statute that the acceptance should be in writing, and there is a similar statute in England as applicable to an inland bill. But where there is no statute to control, the rule is quite general, both in England and in the United States, that an acceptance of a bill of exchange may be by parol. 1 Swift, Dig. 424; Story on Bills, §§ 242, 243, 246; 1 Parsons on Cont. 267; Edwards on Bills and Notes, 409; Dunavan v. Flynn, 118 Mass. 539; Spaulding v. Andrews, 48 Pa. 411.

The statute of frauds does not apply to such an undertaking. One reason may be that the acceptor is regarded as the primary debtor, and his acceptance is an undertaking not merely to pay a debt due from the drawer to the payee, but to pay his own debt to the drawer.

But in this case the defendant relies on the fact that when he accepted the bill he had not in his hands sufficient funds of the drawer to pay the amount required, and contends that the acceptance should therefore either be considered within the statute, or should be held void for want of consideration. This objection ignores the fundamental principle that the acceptance admits everything essential to the validity of the bill, and that want or failure of consideration cannot be shown in a suit by the payee against the acceptor. The presumption is that every bill of exchange is drawn on account of some indebtedness from the drawee to the drawer, and that the acceptance is an appropriation of the funds of the latter in the hands of the former. The rule of law is not unjust that prevents the acceptor from showing as a defence against a suit by the payee a want of funds of the drawer in his hands, for it was his duty to ascertain before he accepted the bill whether he owed the drawer that amount. This was exclusively within his knowledge, but the plaintiff had no means of knowing how the fact was, and he had a right to assume that the defendant would not accept the bill unless he had funds of the drawer sufficient to make good the acceptance. Fisher v. Beckwith, 19 Vt. 31, 46 Am. Dec. 174; Arnold v. Sprague, 34 Vt. 402; United States v. Bank of Metropolis, 15 Pet. 377, 10 L. Ed. 774; Grant v. Ellicott, 7 Wend. (N. Y.) 227; Hoffman v. Bank of Milwaukee, 12 Wall. 181, 20 L. Ed. 366; Parsons on Notes and Bills, 323; 1 Daniel on Negotiable Instruments, 135.

There is no error in the judgment complained of.

Sec. 10, N.I.
C.C. 3091

PUTNAM v. CRYMES.

(Court of Appeals of South Carolina, 1840. 1 McMul. 9, 36 Am. Dec. 250.)

The plaintiff in this case was not the original payee, but held the note by transfer to himself by delivery. The note was made payable to Mancil Owens or holder, and the plaintiff declared as holder, and defendants demurred, on the ground that the holder could not sue without a written assignment. I regarded holder as synonymous with bearer and overruled the demurrer.

Curia, per BUTLER, J. The word "bearer" is usually inserted in a negotiable note, transferable by delivery. But without it, the maker of a note may make it transferable by delivery, either by circumlocution, or using a word of precisely the same import. As if a note were made payable to A. B., or to any one to whom he may deliver it; or to any one who might hold the same by delivery. In both cases the bearer would be sufficiently meant and designated, although the word was not used. If it was the intention of the maker to make it payable to any one who acquires possession by delivery, he has no right to complain when it is presented to him without a written transfer. "Holder" is a word of the same import as "bearer," and both may acquire a title by lawful delivery, according to the terms of the contract. All the law requires is, that the paper must have negotiable words on its face, showing it to be the intention to give it a transferable quality by delivery; otherwise the instrument must be transferred by written endorsement, if payable to order; or sued on by the original payee, if there are no negotiable words at all.

The decision below is affirmed: the whole court concurring.

GILLEY v. HARRELL et al.

(Supreme Court of Tennessee, 1907. 118 Tenn. 115, 101 S. W. 424.)

Bill by A. T. Gilley against J. R. Harrell and others. From a decree dismissing plaintiff's bill, he appeals. Affirmed.[6]

SANSOM, Special Judge. The complainant, A. T. Gilley, appeals to this court from the decree of the Court of Chancery Appeals dismissing his bill. The original bill in the case was filed in the chancery court at Murfreesboro to collect a note for $300 alleged to have been executed by the defendant J. R. Harrell to one Robert B. Meeks, and by Meeks transferred and assigned to the complainant, and seeking to foreclose a mortgage or deed of trust given to secure the payment of the note and to set aside a previously executed trust deed resting upon the property.

[6] Part of the opinion is omitted.

The bill alleges the execution and transfer of the note, and avers that the plaintiff is an innocent holder thereof, having acquired same before maturity, for value, and in due course of trade; and it is charged that the previously executed trust deed resting upon the property was fraudulent and void.

The defendant J. R. Harrell filed an answer, in which he says that he might have executed a note payable to Meeks for $300, and might have executed a mortgage to secure the payment thereof, but that, if he did so, he was drunk at the time and incapacitated for the transaction of business, and that the note, if executed, was without consideration and obtained through fraud, and at a time when he was unable to care for or protect himself. The note sued on is in these words:

"$300. Murfreesboro, Tenn., February 5, 1903.

"On the 24th day of December, 1903, I promise to pay to Robert B. Meeks the sum of three hundred ($300) dollars, with interest from date. This note secured by a mortgage on thirty-five acres of land, this day executed by me and wife to Robert B. Meeks.

"J. R. Harrell."

The note is indorsed as follows:

"I this day transfer and assign this note over to A. T. Gilley, for value received, with all the equities, this February 10, 1903.

"R. B. Meeks."

It should be stated that the answer defends upon the ground that the complainant, Gilley, is a dealer in notes and that the purchase of this note was void, because of his not having to pay any license as such dealer.

Four errors are assigned to the decree of the Court of Chancery Appeals. * * *

Taking up these assignments of error in order: The court held that the note above copied was nonnegotiable, and this holding is attacked. Under the common law the note was not negotiable. "When bills of exchange first came into use, as has already been explained, choses in action in general were nonassignable; and, in order that the intention of parties to make commercial paper assignable and negotiable may be indicated, it became the custom to make it in express terms payable to A., or order, or bearer, or using like words giving authority to convey. So, also, when promissory notes were by the statute of Anne declared to be negotiable, like bills of exchange, notes which would fall within the statute were described as containing these [to order or bearer] or other words of negotiability." Tiedeman on Com. Paper, § 27.

In other words, under the common law in order that a note should be negotiable it had to be payable to order, or to bearer, and not directly to the payee.

Section 3505 of Shannon's Code is in these words: "Every note whereby the maker promises to pay money to any other person or order,

or to the order of any other person, shall be negotiable in the same manner as inland bills of exchange by the custom of merchants."

Section 3506 of Shannon's Code is in these words: "Every bill, bond or note for money, whether sealed or not, and whether expressed to be payable to the order or for value received or not, shall be negotiable in the same manner as promissory notes."

It is insisted very earnestly under this latter Code provision, which is section 1 of chapter 4 of the Acts of 1786, that the note in controversy in this case is a negotiable instrument.

By Acts 1899, p. 139, c. 94, entitled "A general act, relating to negotiable instruments, being an act to establish a law uniform with the laws of other states on that subject," it is provided by article 1, § 1, as follows: "An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer. (2) Must contain an unconditional promise or order to pay a sum certain in money. (3) Must be payable on demand or at a fixed or determinable future time. (4) Must be payable to order or to bearer."

By section 184 of this act it is provided: "A negotiable promissory note, within the meaning of this act, is an unconditional promise in writing, made by one to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money, to order or to bearer."

Section 8 of the act is in these words: "An instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order."

By section 9 of the act it is provided as follows: "The instrument is payable to bearer (1) when it is expressed to be so payable, or (2) when it is payable to a person named therein or bearer, or (3) when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable, or (4) when the name of the payee does not purport to be the name of any person, or (5) when the only or last indorsement is an indorsement in blank."

The note in question in this case is not payable to either order or bearer. Under these provisions of the negotiable instrument law, and in order to be negotiable, it must be payable in one or the other of these ways, either to order or to bearer. The earnest insistence, however, of appellant, is that section 3506 of the Code (Shannon's), above quoted, is not repealed by the negotiable instrument act of 1899; that that act does not purport to repeal this section of the Code, which does make the note in question a negotiable instrument. This insistence, however, is not sound; for by necessary implication, section 3506 is repealed by this act, because directly in conflict therewith, and embracing the entire subject-matter thereof. Poe v. State, 85 Tenn. 495, 3 S. W. 658. * * *

NEGOTIABLE BILLS AND NOTES AND THEIR FORMAL AND ESSENTIAL REQUISITES

I. Order Contained in a Bill [1]

RUFF v. WEBB.

(Nisi Prius, before Lord Kenyon, C. J., 1794. 1 Esp. 129.)

Assumpsit for work and labour, with the common counts.

Plea of the general issue.

The action was brought to recover the amount of wages due by the defendant to the plaintiff.

The plaintiff had been servant to the defendant, and, on his discharging him from his service, had given him a draft for the amount of his wages on an unstamped slip of paper, in the following words:

"Mr. Nelson will much oblige Mr. Webb, by paying to J. Ruff, or order, twenty guineas on his account."

This draft the plaintiff had taken, but it did not appear that he had ever demanded payment of it from Mr. Nelson, to whom it was addressed.

It was given in evidence on the part of the defendant, that he lived in the country, and kept cash with Mr. Nelson in London, and that he paid all his bills in that manner, by drafts on Nelson; that the plaintiff knew that circumstance, and took the draft without any objection; and that if he had applied to Nelson, that it would have been paid. This evidence was relied on as a discharge, and bar to the action.

Shepherd, for the plaintiff, contended that the only mode by which this could operate as a bar to the action was by taking the draft in question as a bill of exchange; in which case, under St. 3 & 4 Anne, c. 9, § 7, it is declared that if any person shall accept a bill of exchange, in satisfaction of a debt, that the same shall be deemed a full and sufficient discharge, if the person so accepting such bill for his debt shall not take his due course, by endeavoring to get the same accepted and paid, and making his protest for nonacceptance or nonpayment; but he contended that in point of substance it was not a bill of exchange, but a mere request to pay money, not accepted by Nelson, or such as could put the plaintiff into any better situation with respect to his demand. But, if it was taken as a bill of exchange, that it could not be given in evidence at all, as it was not stamped.

It was answered by the defendant's counsel that the plaintiff's having accepted the draft as payment was a waiver of every objection to it, and

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 15.

that he was therefore bound by it, and could not recur to the demand for wages.

Lord KENYON said he was of opinion that the paper offered in evidence was a bill of exchange; that it was an order by one person to another to pay money to the plaintiff or his order, which was in point of form a bill of exchange; that as such it could not be given in evidence, without being legally stamped; and, as the only mode in which it could operate as a discharge of the plaintiff's demand was as stated by the plaintiff's counsel, that the plaintiff in point of law was therefore entitled to recover.

LITTLE v. SLACKFORD.

(Nisi Prius, before Lord Tenterden, C. J., 1828. Moody & M. 171.)

Debt for money paid.

The defendant, being indebted to J. S. for work done, gave him an unstamped paper addressed to the plaintiff in the following words:

"Mr. Little, please to let the bearer have seven pounds, and place it to my account, and you will oblige

"Your humble servant, R. Slackford."

There was also some slight evidence that the defendant had acknowledged the debt.

Comyn, for the defendant, objected that the paper produced was a bill of exchange, and could not be read for want of a stamp, and the other evidence would not warrant a verdict.

Lord TENTERDEN, C. J. I think no stamp is necessary. The paper does not purport to be a demand made by a party having a right to call on the other to pay. The fair meaning is, "You will oblige me by doing it." Even without the paper, the other evidence would probably entitle the plaintiff to a verdict.

Verdict for the plaintiff.

HAMILTON v. SPOTTISWOODE.

(Court of Exchequer, 1849. 4 Exch. 200.)

The parties, pursuant to the order of Parke, B., agreed to state, for the opinion of the court, the following case:

On the 24th of September, 1842, Alexander Wilson and Patrick Wilson, carrying on the business of typefounders in partnership, under the firm of Alexander Wilson & Sons, were indebted to William Gentie in £6000, for money lent by him to them, no part of which has been paid, except as hereinafter mentioned. The defendant and the firm of Messrs. Eyre & Spottiswoode, of which the defendant was a member, were partners, and had, for some time previously to the date aforesaid, dealt with Alexander Wilson & Sons, purchasing from them, from time

to time, large quantities of type payable quarterly, and for which corresponding quarterly accounts used to be sent in by Alexander Wilson & Sons up to the 31st March, 30th June, 30th September, and 31st December in each year, and it was then expected that those dealings would be continued, as they afterwards were. Alexander Wilson & Sons being applied to for payment, delivered to William Gentle the following order or authority in writing, signed by them and directed to the defendant:

"To Alexander Spottiswoode, Esq.

"London, 24th Sept., 1842.

"Dear Sir—We hereby authorize you to pay on our account, to the order of William Gentle, Esq., the sum of six thousand pounds, at the following periods, deducting the amount from the quarterly accounts for type furnished to you and to Messrs. Eyre & Spottiswoode, viz.:

11th November, 1843	£1,000
11th November, 1844	1,000
11th November, 1845	1,000
11th November, 1846	1,500
11th November, 1847	1,500

"We are, dear sir, yours very truly,

"Alexander Wilson & Sons."

The said order or authority was thereupon taken to the defendant, and underneath the same he wrote the following letter or memorandum, addressed to William Gentle: "Dear Sir—Having received the foregoing authority from Messrs. A. Wilson & Sons, I undertake to make you the payments as above stated. Middle New-Street, September 24, 1842. Andrew Spottiswoode"—which was then, with the defendant's consent, handed to William Gentle. * * *

The question for the opinion of the court is, first, whether the writing dated 24th September, 1842, requires a bill of exchange or promissory note stamp.[2]

Pollock, C. B. We are all of opinion that the letters do not require a bill of exchange or promissory note stamp; they do not import an absolute intention that the money should at all events be paid, but merely authorize the defendant to pay it. As to the other point we will take time to consider.

Cur. adv. vult.

The judgment of the court was now delivered by

Alderson, B. We intimated, at the time of the first argument in this case, our opinion that the two letters dated the 24th of September, 1842, the first from Wilson & Sons to the defendant, and the second, written on the same paper, from the defendant to the testator Mr. Gentle, do not require to be stamped, either as a promissory note or

[2] The statement is abridged, and the arguments and a portion of the opinion of Alderson, B., are omitted.

bill of exchange, but only constitute and require to be stamped as an agreement. That opinion we still retain. We do not think this is an order to pay any particular sum of money at all; but we are of opinion that it amounts to an agreement, that, if any of the specified portions of debt mentioned therein be at any time unpaid by Messrs. Wilson & Sons to Mr. Gentle, and if, after that event has occurred and come to the knowledge of the defendant, any quarterly accounts for type should become due from the defendant to Wilson & Sons, the defendant would, so far as those accounts would extend, pay the debt due from Wilson & Sons to Gentle, of which he might so have notice. Such an agreement, when assented to by all the parties, would be irrevocable. Then, if so, it seems to follow that the plaintiffs are entitled to recover in the present suit. * * *

Judgment for the plaintiffs.

II. Promise Contained in a Note[3]

HUSSEY v. WINSLOW.

(Supreme Judicial Court of Maine, Lincoln, 1870. 59 Me. 170.)

On exceptions.

Assumpsit on a promissory note, commenced by trustee process, in which William Vannah was summoned as trustee of the principal defendant.

The trustee disclosed that on the 4th day of October, 1869, and before the service of the writ in this action on him, he delivered to the said Winslow to whom he was indebted on account, a writing, of which the following is a copy:

5 cent stamp.	"Nobleboro, Oct. 4, 1869. Nathaniel O. Winslow, Cr. By labor 16¾ days @ $4 per day.....$67 00 Good to barer. Wm. Vannah,"

and claimed that he should be discharged.

The presiding judge ruled that the instrument was a negotiable promissory note, and that the trustee be discharged. Thereupon the plaintiff alleged exceptions.[4]

DANFORTH, J. The only question here raised is whether the written instrument, disclosed by the trustee, is a negotiable promissory note. It was evidently so intended by the parties, and seems to possess all that is legally requisite to constitute it such. It is not a mere acknowledgment of a debt, as contended by the plaintiff. It is true that the words, "Cr. by labor 16¾ days @ $4 per day .... $67.00," may very properly

[3] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 16.

[4] The arguments of counsel are omitted.

be construed as an admission that so much money is due Mr. Winslow for labor performed by him. But the remaining words, "Good to barer," are not inconsistent with what goes before and cannot therefore be rejected. They must have some meaning, and, taken in connection with the words previously used, that meaning cannot be doubtful. In Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462, in a similar instrument the word "good" was held to imply a promise. In the paper under consideration, no other meaning can be attached to it than a promise to pay for the labor received. Nor is the promise to pay in labor. Labor is not mentioned except as the consideration for the promise. The sum due has prefixed to it the mark for dollars, and there is no intimation that it is to be paid in any other way than by money. In such cases the debt can only be discharged by lawful currency. The sum to be paid is definite and subject to no contingency. It is to be paid absolutely, and as no time is given it is payable on demand. Nor can there be any doubt as to the payee, if any were necessary in a note payable to bearer. Nathaniel O. Winslow is named as the person from whom the consideration proceeds, and if there were no other indication as to whom the promise is made the law would deem this sufficient. Story on Notes, § 36.

It would seem that the only possible construction which can be given to this instrument is, substantially, this: In consideration of 16¾ days' labor, performed by Nathaniel O. Winslow, at 4 per day, amounting to $67, I promise to pay him or bearer, that sum on demand. [Signed] William Vannah.

Here we have every element of a negotiable promissory note; a maker, a payee, a promise or engagement to pay a certain sum of money at a specified time, absolutely and unconditionally, and the word "bearer" to make it negotiable.

Exceptions overruled.

GAY v. ROOKE.

(Supreme Judicial Court of Massachusetts, Middlesex, 1890. 151 Mass. 115, 23 N. E. 835, 7 L. R. A. 392, 21 Am. St. Rep. 434.)

Contract on the following instrument, declared on as a promissory note:

"Marlboro', Sept. 23, 1881.

"I. O. U., E. A. Gay, the sum of seventeen dolls. 5/100, for value received. John R. Rooke."

Writ dated September 19, 1887. At the trial in the superior court, without a jury, before Dewey, J., the only issue was whether the plaintiff was entitled to interest from the date of the instrument, or from that of the writ, the service of which was the only demand made by the plaintiff.

The plaintiff asked the judge to rule, as matter of law, that he was entitled to interest from the date of the instrument. The judge declined so to rule, and ruled that interest could be recovered from the date of the writ only, and found for the plaintiff for $17.-05 only; and the plaintiff alleged exceptions.

DEVENS, J. In order to constitute a good promissory note, there should be an express promise on the face of the instrument to pay the money. A mere promise implied by law, founded on an acknowledged indebtedness, will not be sufficient. Story, Prom. Notes, § 14; Brown v. Gilman, 13 Mass. 158. While such promise need not be expressed in any particular form of words, the language used must be such that the written undertaking to pay may fairly be deduced therefrom. Commonwealth Ins. Co. v. Whitney, 1 Metc. 21. In this view, the instrument sued on cannot be considered a promissory note. It is an acknowledgment of a debt only; and, although from such an acknowledgment a promise to pay may be legally implied, it is an implication from the existence of the debt, and not from any promissory language. Something more than this is necessary to establish a written promise to pay money. It was therefore held in Gray v. Bowden, 23 Pick. 282, that a memorandum on the back of a promissory note, in these words, "I acknowledge the within note to be just and due," signed by the maker, and attested by a witness, was not a promissory note signed in the presence of an attesting witness within the meaning of the statute of limitations. In England an I. O. U., there being no promise to pay embraced therein, is treated as a due-bill only. The cases, which arose principally under the stamp act, are very numerous, and they have held that such a paper did not require a stamp, as it was only evidence of a debt. 1 Daniel, Neg. Inst. (3d Ed.) § 36; 1 Rand. Com. Paper, § 88; Fesenmayer v. Adcock, 16 Mees. & W. 449; Melanotte v. Teasdale, 13 Mees. & W. 216; Smith v. Smith, 1 Fost. & F. 539; Gould v. Coombs, 1 C. B. 543; Fisher v. Leslie, 1 Esp. 425; Israel v. Israel, 1 Camp. 499; Childers v. Boulnois, Dowl. & R. N. P. 8; and Beeching v. Westbrook, 8 Mees. & W. 412.

While, in a few states, it has been held otherwise, the law as generally understood in this country is that, in the absence of any statute, a mere acknowledgment of a debt is not a promissory note; and such is, we think, the law of this commonwealth. Gray v. Bowden, 23 Pick. 282; Commonwealth Insurance Co. v. Whitney, 1 Metc. 21; Daggett v. Daggett, 124 Mass. 149; Almy v. Winslow, 126 Mass. 342; Carson v. Lucas, 13 B. Mon. (Ky.) 213; Garland v. Scott, 15 La. Ann. 143; Currier v. Lockwood, 40 Conn. 349, 16 Am. Rep. 40; Brenzer v. Wightman, 7 Watts & S. (Pa.) 264; Biskup v. Oberle, 6 Mo. App. 583. Some states have by statute extended the law of bills and promissory notes to all instruments in writing

and whereby any person acknowledges any sum of money to be due to any other person. 1 Randolph, Com. Paper, § 88; Rev. St. Ill. 1884, c. 98, § 3; Gen. St. Colo. 1883, c. 9, § 3; Rev. St. Ind. 1881, § 5501; Rev. Code Iowa, 1873, § 2085; Rev. Code Miss. 1880, §§ 1123, 1124.

We have no occasion to comment upon those instruments in which words have been used or superadded from which an intention to accompany the acknowledgment with a promise to pay has been gathered, or where the form of the instrument fairly led to that conclusion. Daggett v. Daggett, 124 Mass. 149; Almy v. Winslow, 126 Mass. 342. No such words exist in the instrument sued, nor is it in form anything but an acknowledgment. The words "for value received" recite indeed the consideration, but they add nothing which can be interpreted as a promise to pay. It is therefore unnecessary to consider whether, if the paper were a promissory note, interest should be calculated from its date. Upon this point we express no opinion. If it is to be treated as an acknowledgment of debt only, as we think it must be, the plaintiff is not entitled to interest except from the date of the writ. Even if it was the duty of the defendant to have paid the debt on demand, yet if no demand was made, if no time was stipulated for its payment, if there was no contract or usage requiring the payment of interest, and if the defendant was not a wrongdoer in acquiring or detaining the money, interest should be computed only from the demand made by the service of the writ. Dodge v. Perkins, 9 Pick. 368; Hunt v. Nevers, 15 Pick. 500, 26 Am. Dec. 616. "In general," says Chief Justice Shaw, "when there is a loan without any stipulation to pay interest, and where one has the money of another, having been guilty of no wrong in obtaining it, and no default in retaining it, interest is not chargeable." Hubbard v. Charlestown Railroad Co., 11 Metc. 124; Calton v. Bragg, 15 East, 223; Shaw v. Picton, 4 Barn. & C. 723; Moses v. Macferlan, 2 Burr. 1005; Walker v. Constable, 1 Bos. & P. 306.

Exceptions overruled.

HUYCK v. MEADOR.

(Supreme Court of Arkansas, 1866. 24 Ark. 191.)

CLENDENIN, Special Judge.[5] The appellant in this court, who was the plaintiff in the court below, commenced his action of assumpsit in the circuit court of Pulaski county. The declaration contained two counts; the first count based on the following instrument in writing: "Due I. Huyck, or order, the sum of three thousand nine hundred

[5] Part of the opinion is omitted.

and twenty eight dollars ($3,928), for value received of him, and on settlement up to date. C. V. Meador.
"Little Rock, Ark., Feb. 16, 1865."

* * * * * * * * *

We come now to consider the other objection, raised by the record and the assignment of error. This question grows out of the action of the court below in refusing to permit the plaintiff to read as evidence, on the trial, the writing (a copy of which is given before in this opinion), and which writing may be said to be the foundation of the suit. The first count of the declaration avers that the defendant "made his certain promissory note in writing," etc., and that "he promised to pay immediately," etc. The first question to be decided is, was the instrument offered in evidence a promissory note? and, secondly, if it was, when was it payable?

A promissory note is a written promise for the payment of money. Bayley on Bills, 1, 3. The case of Russell v. Whipple, 2 Cow. (N. Y.) 536, was upon a duebill in the following words: "Due Lawson Russell, or bearer, two hundred dollars and twenty-six cents for value received." The court held in this case that this instrument was a promissory note.

In the case of Kimball v. Huntington, 10 Wend. (N. Y.) 679, 680, 25 Am. Dec. 590, the court decided that an instrument similar to the one offered in evidence in this case is a promissory note. As it contains every quality essential to such paper, the acknowledgment of indebtedness on its face implies a promise to pay. So in the case of Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462, it was held that a writing in these words, "Good to Cochran or order, for thirty dollars, borrowed money," is a promissory note. See, also, Smith's Mercantile Law, 263; Luqueer v. Prosser, 1 Hill (N. Y.) 259; Hitchcock v. Cloutier, 7 Vt. 22; United States v. White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374.

Holding, as we do that the instrument declared on in this case and offered in evidence is a promissory note, the inquiry next arises when, by its terms, did it become due and payable. No time of payment being named in the note, it is due immediately, and was so correctly described in the plaintiff's declaration. See Sackett v. Spencer, 29 Barb. (N. Y.) 180; Thompson v. Ketchum, 8 Johns. (N. Y.) 191, 192, 5 Am. Dec. 332; Gaylord v. Van Loan, 15 Wend. (N. Y.) 308; Cornell v. Moulton, 3 Denio (N. Y.) 12.

We are therefore of the opinion that there was no variance between the note offered in evidence and that declared on, and that the circuit court erred in not permitting the note to be read in evidence. * * *

Reversed.

STAGG v. PEPOON.

(Constitutional Court of South Carolina, 1818. 1 Nott & McC. 102.)

This case was tried before Mr. Justice Smith, at Charleston.

It was an action of assumpsit on a duebill, made by the defendant to the plaintiffs. When produced in evidence, it was in the following words: "Due Messrs. Jacob D. Stagg & Co., or order, one hundred and thirty-five dollars, payable on demand. [Signed] Benj. Pepoon."

It appeared in evidence, that the words "or order" were not inserted in the bill originally, and that the plaintiff had requested the defendant to permit him to insert them, with a view to negotiate it; but he expressly refused his assent. The plaintiff, notwithstanding, did insert them.

Several grounds of defense were stated in the brief to have been taken on the trial, in the circuit court, and among others that the insertion of the words "or order" was such an alteration as destroyed the validity of the note.

The jury however, under the direction of the presiding judge, found a verdict for the plaintiff, and a motion was now made for a new trial, on the part of the defendant, on the ground:

That the insertion of the words "or order," in the bill, without the consent of the defendant, is such an alteration, in a material part, as wholly destroyed the validity of the bill, and that the plaintiff was not therefore entitled to recover.

Mr. Justice JOHNSON, delivered the opinion of the court.

It has not been denied in the argument, and numerous authorities prove, that an alteration in a bill of exchange, or promissory note, in a material part, without the consent of the drawer, will discharge him from all liability on it. Chitty on Bills, 85. The duebill, in this case, as it originally stood, without the words "or order," was not negotiable, either by the custom of merchants or the statute of Anne. And that the negotiability of a paper, in mercantile transactions, is material and important, will not be questioned. But it has been suggested that even with the words "or order" the bill was not negotiable, not being a promissory note within the statute of Anne, and that, therefore, the alteration was immaterial, as it did not change the nature and character of the writing.

No precise form of words is necessary to constitute a promissory note; it is sufficient if it amount to a promise or undertaking to pay unconditionally. A "promise to account with J. S. or order," and "I acknowledge myself indebted to A. & Co. to be paid on demand," have been held to be promissory notes within the meaning of the statute of Anne. 1 Selwyn's N. P. 395. It appears to me impossible to distinguish the present case from the last. The word "due" is clearly an ac-

knowledgment of a subsisting debt, and the words "payable on demand" necessarily imply a promise to pay.

I am therefore of opinion that the motion for a new trial ought to prevail.

YOUNG v. AMERICAN BANK. (No. 1.)

(Supreme Court, Special Term, New York County, 1904. 44 Misc. Rep. 305, 89 N. Y. Supp. 913.)

Action by John Young against the American Bank. Warrant of attachment vacated.

GIEGERICH, J. A number of questions are discussed in the briefs, but only a single one need be considered, and that is whether a cause of action is set forth in the papers on which the attachment was procured. The allegations concerning the plaintiff's claim, as set forth in the affidavit, are as follows: That on or about the 1st day of February, 1902, the defendant, for value, made and delivered to the International Money Box Company its certificate of deposit (so-called) in the following form:

"Mexico. $5,000.

"Certificate of Deposit in Favor of the International Money Box Company.

"Mexico, February 1, 1902.

"We hereby certify that we have on this date placed to the credit of the International Money Box Company of New York and Chicago the amount of $5,000 (five thousand dollars) United States currency. This amount is left on deposit in this bank with the understanding that it is not to be withdrawn for two years, counted from this date, in consideration of which we hereby agree to pay the International Money Box Company straight interest at the rate of 7% (seven per cent.) per annum. The American Bank, F. J. Dunkerly, Cashier.

"The American Bank, Ricardo Colin, Ass't Manager."

It is further alleged that prior to the maturity of said certificate the same was, for value, indorsed by the International Money Box Company, and thereafter was, for value, transferred and delivered to the plaintiff, who is now the holder and owner thereof. Furthermore, that at maturity the certificate was presented for payment, and payment demanded and refused, and that the certificate remains in the hands of the plaintiff wholly unpaid. It is evident at a glance that the theory upon which the attachment was procured is that the so-called certificate is an instrument for the payment of money, which could be assigned by indorsement and delivery. On the other hand, on behalf of the defendant it is insisted that the paper is not a negotiable instrument with the well-recognized characteristics of such instruments, but is a mere receipt contain-

ing no promise to pay whatever, quoting upon this point, among other authorities, Daniel on Negotiable Instruments, as follows: "A simple certificate of deposit containing no words of promise to pay the amount is nothing more than a receipt, and could not be the basis of an action against the bank, nor would it be a transferable security; * * * the word 'certify' adding no additional force to the instrument as purporting a contract." 2 Daniel, Neg. Insts. (5th Ed.) § 1704.

In Hotchkiss v. Mosher, 48 N. Y. 478, in speaking of a paper quite similar in its character to the one in hand, the court said (page 482): "The certificate was simply an acknowledgment of so much money deposited with the bank. It was of the same force and effect as a receipt for money. The word 'certify' adds no additional force to the instrument, as purporting a contract. It contained no promise on the part of the defendants; and, if it had, the portion which operated as a receipt for money was quite as capable of separation from that part which evidenced a contract as in the case of a bill of lading. A certificate or acknowledgment that another has deposited a sum of money has the effect of an acknowledgment by one party that he has received a sum of money from another. A simple certificate like the one in question is not the basis of an action, like a promise in writing, but would be evidence, like a receipt, to raise an implied promise to pay in an action for money had and received. We are of the opinion that parol evidence was admissible to explain the certificate in the same manner as in the case of a receipt."

So, too, in the more recent case of First Nat. Bank v. Clark, 134 N. Y. 368, 32 N. E. 38, 17 L. R. A. 580, the same court, speaking of a paper in the following form: "Deposited by Sliney & Whelan with Judson H. Clark, Banker, Scio, N. Y., December 5, 1882. Discount, $3,412.50. F. M. Babcock"—said (page 372, 134 N. Y., page, 39, 32 N. E., 17 L. R. A. 580): "The appellant calls it [the paper] a 'certificate of deposit,' but such designation is not accurate. It is in fact what the witnesses for both plaintiff and defendant assert it to be, a deposit slip or deposit check. The use of the deposit slip is well understood. It constitutes an acknowledgment that the amount of money named therein has been received. It is a receipt, and nothing more. No promise is made to pay the sum named on return of the paper. Nor is it expected, either by the depositor or depositary, that it will ever be presented to the bank again unless a dispute should arise as to the amount of deposit, in which event it would become important as evidence. It is not intended to furnish evidence that there remains money in the bank to the credit of a depositor, but to furnish evidence as between depositor and depositary that on a given date there was deposited the sum named. It may all, or nearly all, be checked out at the

moment of making the deposit slip; but the depositor will not be refused it on that account, for long-established usage has fixed its status in banking as a mere receipt, an acknowledgment that the depositor placed the amount named therein on deposit. It is not proof of liability, and it will not support an action against the bank. Hotchkiss v. Mosher, 48 N. Y. 482; 2 Daniel, Neg. Insts. § 1704. Should a suit be brought on the debt, however, it would furnish evidence as to time of deposit and amount, but it has no other use, unless it be to assist in the settlement of a dispute out of court. The delivery of the deposit slip, therefore, did not operate to assign the debt. There was no writing made or delivered to the plaintiff other than the check and deposit slip, both of which we have already considered."

Calling the paper before us a certificate of deposit does not alter its true character, or import into it the express promise to pay which is a characteristic of negotiable instruments, and which is a part of certificates of deposit properly so called. In volume 5 of the American and English Encyclopædia of Law (2d Ed.) at page 801, a certificate of deposit is defined as "a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to bearer, to the order of the depositor, or to some other person or to his order." I am clearly of the opinion, therefore, that the papers on which the attachment was procured are fatally defective in failing to show any valid assignment of the claim in question. Such an assignment cannot be made merely by indorsing the paper, but would have to be made in the same manner as any other chose in action is assigned.

Motion granted, with $10 costs.

YOUNG v. AMERICAN BANK. (No. 2.)

(Supreme Court, Special Term, New York County, 1904. 44 Misc. Rep. 308, 89 N. Y. Supp. 915.)

Action by Young against the American Bank. Motion to vacate warrant of attachment granted.

GIEGERICH, J.[6] The five instruments upon which this action is proposed to be brought are distinctly different in their terms from the one involved in action No. 1, herewith decided (44 Misc. Rep. 305, 89 N. Y. Supp. 913), the dates varying, and read as follows:

"Mexico. This is to certify that the International Money Box Co. of New York has a deposit of the amount of three hundred

[6] Part of the opinion is omitted.

dollars ($300) U. S. currency in this bank, which deposit bears interest at the rate of seven per cent. (7%) per annum, payable annually. This certificate is due two years from this date, or on the seventh of April, nineteen hundred and four, and will be cashed only upon being returned to the bank by the International Money Box Co. of New York or their order. City of Mexico, April 7, 1902. The American Bank, F. J. Dunkerly, Cashier. The American Bank, Ricardo Colin, Ass't Manager."

While there is no promise to pay in so many words, still I think the language of the last paragraph of the instrument is susceptible of no other construction than such a promise to pay at the expiration of two years either to the International Money Box Company or their order. It is noticeable in this case, as distinguished from the other, that the paper upon its face is treated as possessing negotiable attributes in that it provides for payment either to the original holders or to their order, and, furthermore, provides for the return of the certificate before payment will be made. This differentiates it in a marked degree from writings like that referred to in the memorandum herewith handed down in action No. 1, which contains no promise to pay, and no provision for transference by order, nor any requirement that it be produced when payment is demanded. Because of these facts the reasons set forth in the authorities quoted from in that memorandum do not apply, and it must be held that the indorsement and delivery in this case constituted a sufficient assignment.

The attachment is challenged, however, on other grounds. * * * Motion granted on other grounds.

III. Certainty as to the Terms of the Order or Promise[7]

KELLEY v. HEMMINGWAY.

(Supreme Court of Illinois, 1852. 13 Ill. 604, 56 Am. Dec. 474.)

This cause was tried by Henderson, Judge, without the intervention of a jury, at the special term in June, 1851, of the Du Page circuit court, and resulted in a judgment for Hemmingway, the assignee of the note, for the sum of $75.73 damages and costs. Thereupon Kelley appealed to this court.

The facts of the case are stated in the opinion.

TREAT, C. J. This was an action brought by Hemmingway against Kelley before a justice of the peace, and taken by appeal

[7] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 17–20.

to the circuit court. On the trial in the latter court, the plaintiff offered in evidence an instrument in these words:

"Castleton, April 27, 1844.

"Due Henry D. Kelley $53, when he is twenty-one years old, with interest. David Kelley."

On the back of which was this indorsement:

"Rockton, May 21, 1849.

"Signed the within, payable to Moses Hemmingway.

"Henry Kelley."

The plaintiff proved that the payee became of age in August, 1849. The defendant objected to the introduction of the instrument because it was not negotiable, but the court admitted it in evidence and rendered judgment for the plaintiff.

Our statute makes promissory notes assignable by indorsement in writing, so as absolutely to vest the legal interest in the assignee. Was the instrument in question a promissory note? To constitute a promissory note, the money must be certainly payable, not dependent on any contingency, either as to event or the fund out of which payment is to be made, or the parties by or to whom payment is to be made. If the terms of an instrument leave it uncertain whether the money will ever become payable, it cannot be considered as a promissory note. Chitty on Bills, 134. Thus, a promise in writing to pay a sum of money when a particular person shall be married is not a promissory note, because it is not certain that he will ever be married. Pearson v. Ganet, 4 Mod. 242; Beardsley v. Baldwin, 2 Strange, 1151. So of a promise to pay when a particular ship shall return from sea, for it is not certain that she will ever return. Palmer v. Pratt, 2 Bing. 185; Coolidge v. Ruggles, 15 Mass. 387. In all such cases, the promise is to pay on a contingency that may never happen. But if the event on which the money is to become payable must inevitably take place, it is a matter of no importance how long the payment may be suspended. A promise to pay a sum of money on the death of a particular individual is a good promissory note, for the event on which the payment is made to depend will certainly transpire. Colehan v. Cooke, Willes, 393; s. c., 2 Strange, 1217.

In this case, the payment was to be made when the payee should attain his majority—an event that might or might not take place. The contingency might never happen, and therefore the money was not certainly and at all events payable. The instrument lacked one of the essential ingredients of a promissory note, and consequently was not negotiable under the statute. The fact that the payee lived till he was twenty-one years of age makes no difference. It was not a promissory note when made, and it could not become such by matter ex post facto. The plaintiff has not the legal title to the instrument. If it presents a cause of action against the maker, the suit must be brought in the name of the

payee. The case of Goss v. Nelson, 1 Burr. 226, is clearly distinguishable from the present. There the note was made payable to an infant when he should arrive at age, and the day when that was to be was specified. The court held the instrument to be a good promissory note, but expressly on the ground that the money was at all events payable on the day named, whether the payee should live till that time or die in the interim; and it was distinctly intimated that the case would be very different had the day not been stated in the note. It was regarded as an absolute promise to pay on the day specified, and no effect was given to the words that the payee would then become of age.

The judgment must be reversed.

COOKE v. COLEHAN.

(Court of King's Bench, 1744. 2 Str. 1217.)

On error from C. B. a note to pay to A. or order, six weeks after the death of the defendant's father, for value received, was held to be a negotiable note within the statute 3 Anne, c. 9, for there is no contingency, whereby it may never become payable, but it is only uncertain as to the time, which is the case of all bills payable at so many days after sight. In Communi Banco it held three arguments, and was held good upon a solemn resolution delivered by Chief Justice WILLES.

LEADER v. PLANTE.

(Supreme Judicial Court of Maine, 1901. 95 Me. 339, 50 Atl. 54, 85 Am. St. Rep. 415.)

FOGLER, J.[8] This is an action of assumpsit by the indorsee against the maker of a written instrument, declared upon as a promissory note, of the following tenor, namely:

"$406. Auburn, Maine, August 30th, 1892.

"Within one year after date I promise to pay to the order of Richard F. Leader four hundred and six dollars at with interest. Value received. Telesphore Plante."

Witness: "P. H. Kelleher."

Indorsed: "Richard F. Leader."

The writing was indorsed and delivered by the payee to the plaintiff January 2, 1893.

It is claimed in defense that the instrument is not a valid negotiable promissory note, for the reason that the time of payment named therein is not stated with sufficient certainty. In other words, it is contended

[8] Part of the opinion is omitted.

that "within twelve months" is too uncertain and indefinite as to time of payment to give the instrument the character of a negotiable promissory note. It is familiar law that, to constitute a negotiable promissory note, the time of payment must be stated with certainty. It is also a familiar maxim that that is certain which can be made certain.

"A valid promissory note is not necessarily negotiable. To make it such by the law merchant it must run to order or bearer, be payable in money for a certain definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely, and not upon a contingency." Roads v. Webb, 91 Me. 410, 40 Atl. 128, 64 Am. St. Rep. 246.

It is well settled that a note payable at the death of the maker is a valid negotiable promissory note, as death will inevitably occur, and the time of payment can thus be made certain. Martin v. Stone, 67 N. H. 367, 29 Atl. 845.

"Within" a certain period, "on or before" a day named, and "at or before" a certain day, are equivalent terms, and the rules of construction apply to each alike. As stated by Mr. Justice Strout in Roads v. Webb, supra, the question whether a note made payable "on or before" a day certain states the time of payment with sufficient certainty to constitute a negotiable note has not been decided in this state.

In Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464, a note "to be paid in the course of the season now coming" was held to be negotiable for the reason that the "season now coming" must come by mere lapse of time.

But in Hubbard v. Mosely, 11 Gray, 170, 71 Am. Dec. 698, the court of Massachusetts held that a promissory note payable 90 days after date, containing a stipulation that the note shall be given up to the maker as soon as the amount of it is received by the payee, is not negotiable; thus practically overruling the case of Cota v. Buck.

The late Massachusetts decisions upon this point follow the doctrine of Hubbard v. Mosely. Way v. Smith, 111 Mass. 523; Stults v. Silva, 119 Mass. 137.

Mr. Justice Cooley, in Mattison v. Marks, 31 Mich. 423, 18 Am. Rep. 197, referring to Hubbard v. Mosely, remarks: "It is to be regretted, perhaps, that the learned judge who delivered the opinion did not deem it important to present more fully the reasons that led him to his conclusions, instead of contenting himself with a simple reference to the general doctrine that a promissory note must be payable at a time certain."

In Jillson v. Hill, 4 Gray (Mass.) 316, it was held that a note payable "on demand, with interest within six months," was a promise to pay within six months in any event, and sooner if demanded.

We think that the great weight of authority and of reason is opposed to the present Massachusetts doctrine.

Mattison v. Marks, supra, was a suit upon a written instrument containing a promise to pay a sum certain "on or before" a day named. It was contended in defense that it was not a promise to pay on a day certain, and consequently was not a negotiable promissory note. The court held that the instrument was a negotiable promissory note. Mr. Justice Cooley, in delivering the opinion of the court, says: "The legal rights of the holder are clear and certain. The note is due at a time fixed, and it is not due before. True, the maker may pay sooner, if he shall choose; but this option, if exercised, would be a payment in advance of the legal liability to pay, and no more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings."

It is held in Curtis v. Horn, 58 N. H. 504, that a promissory note, payable "on or before the first day of May next," is negotiable. The court say in the opinion: "It is now the common law that, where payment is made to depend upon an event that is certain to come, and uncertain only in regard to the time when it will take place, the note or bill is negotiable." The court say further: "The recent Massachusetts cases cited by the defendant place the conclusions arrived at upon common-law grounds; yet they fail to state the reasons for overruling Cota v. Buck, and the law as held in other jurisdictions, and we are unable to see any."

The doctrine thus laid down by the courts of Michigan and New Hampshire is fully sustained by numerous authorities, of which we cite Bates v. Leclair, 49 Vt. 230; Riker v. Manufacturing Co., 14 R. I. 402, 51 Am. Rep. 413; Insurance Co. v. Bill, 31 Conn. 534–538; Jordan v. Tate, 19 Ohio St. 586; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; Chicago Ry. Equipment Co. v. Merchants' Bank, 136 U. S. 268–285, 10 Sup. Ct. 999, 34 L. Ed. 349; Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542.

Our conclusion is that the instrument here in suit is a valid, negotiable, promissory note. * * *

Judgment for plaintiff.

WORDEN v. DODGE et al.

(Supreme Court of New York, 1847. 4 Denio, 159, 47 Am. Dec. 247.)

Assumpsit. On the trial the plaintiff gave in evidence an agreement, signed by the defendants, bearing date October 12, 1839, by which, for value received, they jointly and severally promised to pay to the plaintiff, by his name or order, $250, with interest, payable one half in two years and the other half in three years from the day of said agreement, "out of the net proceeds, after paying the costs and expenses of ore to be raised and sold from the bed on the lot this day conveyed by Edward Madden to Edwin Dodge, which bed is to be opened and the ore disposed of as soon as conveniently may be."

On reading the agreement the plaintiff rested, and the defendants moved for a nonsuit, as the plaintiff had not shown that the defendants had received enough from the ore to pay the note, nor had they shown any default or negligence on their part. The judge held that the plaintiff could not recover without proving that the defendants had received funds from the ore to enable them to pay, or had neglected to work the ore bed, and directed a nonsuit.

The plaintiff excepted.

BEARDSLEY, J. The nonsuit was proper. A promissory note must be payable absolutely, and not upon any contingency as to time or event. 3 Kent (5th Ed.) p. 74; Smith on Merc. Law, 113, 116; Story on Prom. Notes, §§ 1, 22 to 26; id. on Bills of Exch. §§ 46, 47; Chit. on Bills (10th Amer. Ed.) p. 132 to 139.

This was not such an engagement, for although the promise was to make payments at certain specified times, the payments were to be made "out of the net proceeds" "of ore to be raised and sold" from a certain ore bed. Here was a contingency; the fund might turn out to be inadequate, in which case there would be no obligation to pay at any time. It was not a promise to pay "absolutely and at all events," as a promissory note always is.

New trial denied.

FIRST NAT. BANK OF HUTCHINSON v. LIGHTNER.

(Supreme Court of Kansas, 1906. 74 Kan. 736, 88 Pac. 59, 8 L. R. A. [N. S.] 231, 118 Am. St. Rep. 353.)

The court made the following special findings of fact and conclusions of law:

"That the Snyder Planing Mill Company entered into a contract with the defendant, Lightner, for the erection of a certain barn at the contract price of $3,500. That prior to the completion of said barn, and on September 28, 1903, the Snyder Planing Mill Company was duly adjudicated bankrupt, and the defendant, Lightner, was compelled to and did complete the barn.

"That prior to the adjudication of the Snyder Planing Mill Company as bankrupt, at the request of said company, Lightner accepted two orders, one for $1,000 and one for $1,500 which said orders and acceptances were identical with the exception of the amounts and dates. The one for $1,500 reads as follows:

" 'Hutchinson, Kansas, Aug. 10, 1903.

" 'G. W. Lightner, Offerle, Kansas—Dear Sir: Pay to the order of the First National Bank of Hutchinson, Kansas, on account of contract between you and the Snyder Planing Mill Co. $1,500.

" 'The Snyder Planing Mill Co.,

" 'Accepted. G. W. Lightner. Per. J. F. Donnell, Treas.'

"Said two orders, so accepted, were by the Snyder Planing Mill Company hypothecated with the First National Bank of Hutchinson, Kan., to secure two certain demand notes drawing 10 per cent. interest and of even amounts with said orders; the $1,000 order being hypothecated about August 22, 1903, and the $1,500 order on or about August 11, 1903. That the proceeds of said notes were at said dates duly received from said bank, and used by the Snyder Planing Mill Company. Said notes are still due and unpaid.

"The said orders were so accepted by Lightner on or about August 10, 1903, and that about September 30th Lightner took up the $1,000 order by giving therefor his check for $1,000 to the cashier of plaintiff, which was as follows:

"'Kinsley, Kansas, Sept. 30, 1903.

"'The National Bank of Kinsley: Pay to E. W. Eagan, cashier, or order, $1,000.00. One thousand dollars.

"'George W. Lightner.'

"That said Lightner stopped payment on said check prior to its presentation, and no part thereof has been paid, nor has any part of the $1,500 order been paid. That, prior to the giving of the two orders, Lightner paid the Snyder Planing Mill Company $1,000 upon said contract, and that he was compelled to expend $1,624.04 to complete the barn. That there was a balance due and unpaid on said contract of $872.96 when this action was commenced.

* * * * * * * * *

"First. That said orders were nonnegotiable, and were subject to the same defenses in the hands of the First National Bank of Hutchinson, Kan., as if they had remained in the hands of the Snyder Planing Mill Company.

"Second. That the plaintiff is entitled to judgment in this action in the sum of $970 with interest from this date at 6 per cent. per annum and for costs. Chas. E. Lobdell, Judge."

Plaintiff brings the cause here upon a transcript, and alleges error in the conclusions of law upon which the judgment is based and error in overruling the motion for a new trial.[9]

PORTER, J. (after stating the facts as above). The main controversy is whether the orders given by the planing mill company to the bank, and accepted by defendant, are negotiable instruments. It is true that no specific time of payment is mentioned, but that does not affect their validity as such instruments, and, where no date is mentioned, they are payable on demand. 4 A. & E. Enc. of Law (2d Ed.) 133 and note 3; Douglass v. Sargent & Bro., 32 Kan. 413, 4 Pac. 861. Each of them, therefore, possesses all the essential elements of a bill of exchange unless the words quoted make them payable out of a particular fund and conditionally so that the acceptance is thereby qualified.

[9] The statement of the case is abridged.

The law is well settled that a bill or note is not negotiable if made payable out of a particular fund. 1 Daniel on Neg. Inst. (5th Ed.) § 50; White v. Cushing, 88 Me. 339, 34 Atl. 164, 32 L. R. A. 590, 51 Am. St. Rep. 402. But a distinction is recognized where the instrument is simply chargeable to a particular account. In such a case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement. 1 Daniel on Neg. Inst. (5th Ed.) § 51; Tiedeman on Bills & Notes, § 20. In Ridgely Bank v. Patton et al., 109 Ill. 479, it is said: "A bill or note, without affecting its character as such, may state the transaction out of which it arose, or the consideration for which it was given." "So, also, the insertion into a bill or note of memoranda, explaining the nature of the business or debt, for which the instrument is given, will not make it nonnegotiable, for such a memorandum does not make the payment conditional." Tiedeman on Com. Paper, § 26.

The test in every case is said to be: "Does the instrument carry the general personal credit of the drawer or maker, or only the credit of a particular fund?" 4 A. & E. Enc. of Law, 89. A promise to pay a certain sum "out of my next quarter's mail pay, which becomes due January 1, 1883," was held in Nichols v. Ruggles, 76 Me. 25, to be an absolute promise to pay a certain sum of money. In Haussoullier against Hartsinck, 7 Term R. (Durnford & East), 733, it was held that an instrument promising to pay a certain sum "being a portion of a value, as under deposit in security for the payment hereof," was a promissory note payable at all events. In Pierson v. Dunlop, 2 Cowp. 571, an order which was to be charged "to freight" was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable. Bank v. Michael, 96 N. C. 53, 1 S. E. 855. Likewise a note which stated that it was given in consideration of certain personal property, the title of which was not to pass unless the note was paid. Chicago Railway Co. v. Merchants' Bank, 136 U. S. 268, 10 Sup. Ct. 999, 34 L. Ed. 349.

This court held in Clark v. Skeen, 61 Kan. 526, 60 Pac. 327, 49 L. R. A. 190, 78 Am. St. Rep. 337, that "a note for the payment of a certain sum at a fixed date is not rendered nonnegotiable by a stipulation that, upon default in the payment of interest, the whole amount shall become due at the option of the holder, and then draw a greater rate of interest." In Corbett v. Clark and Another, 45 Wis. 403, 30 Am. Rep. 763, an order to pay a certain sum "and take the same out of our share of the grain," referring to grain harvested or growing on certain farms, accepted by the drawee, was said to be a valid bill of exchange, and the order and acceptance absolute, the words above quoted merely indicating the means of disbursement. In Redman v. Adams, 51 Me. 429, a bill directing the drawee to charge the amount

against the drawer's share of fish caught on a certain schooner is held valid and negotiable.

One of the leading cases is Macleed v. Snee, 2 Str. 765. There a bill of exchange was dated May 25th for the payment of a certain sum one month after date, "as my quarterly half-pay to be due from 24th of June to 27th of September next, by advance." This was held a negotiable bill of exchange. In Spurgin v. McPheeters, 42 Ind. 527, an instrument in the following form was said to possess all the requisites of a bill of exchange: Greencastle, Ind., Aug. 22d, 1870. Mr. D. M. Spurgin—Sir, please pay to Jesse McPheeters, or order, the sum of one hundred and nineteen dollars on said bill of 1¾ in. lumber, and oblige the firm of Geo. W. Hinton & Co." In Whitney v. Eliot National Bank, 137 Mass. 351, 50 Am. Rep. 316, the drafts or bills of exchange were in the ordinary form except that they contained the direction to "charge the same to account of 250 bbls. meal ex schooner Aurora Borealis." The court said: "This direction to charge the amount of the bills to a particular account, we think, does not make them payable conditionally, or out of a particular fund; they are still payable absolutely, and are negotiable, and do not constitute an assignment of a particular fund, or of a part of a particular fund. * * * Macleed v. Snee, 2 Str. 762; Redman v. Adams, 51 Me. 429; Corbett v. Clark, 45 Wis. 403, 30 Am. Rep. 763; Coursin v. Ledlie, 31 Pa. 506; Spurgin v. McPheeters, 42 Ind. 527."

The rule with regard to words which refer to the consideration is well stated in Siegel et al. v. Chicago Trust & Sav. Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51, as follows: "The mere fact that the consideration for which a promissory note is given is recited in it, although it may appear thereby that it was given for or in consideration of an executory contract, or promise on the part of the payee, will not destroy the negotiability of the note, unless it appears through the recital that it qualifies the promise to pay, and renders it conditional or uncertain, either as to the time of payment or the sum to be paid." The following authorities are also in point: Matthews v. Crosby, 56 N. H. 21; Shepard v. Abbott, 137 Mass. 224; Id., 179 Mass. 300, 60 N. E. 782; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Hillstrom v. Anderson, 46 Minn. 382, 49 N. W. 187; Bank of Kentucky v. Sanders & Wier, 3 A. K. Marsh. (Ky.) 184, 13 Am. Dec. 149; 4 A. & E. Enc. of Law, 89; 7 Cyc. 580.

Our negotiable instrument law (chapter 70, § 10; Gen. St. 1905, § 4542), which is merely declaratory of the common law upon the subject, reads as follows: "When promise is unconditional. An unqualified order or promise to pay is unconditional, within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument; but

an order or promise to pay out of a particular fund is not unconditional." Plaintiff and defendant agree upon the abstract proposition of law involved in the controversy. Counsel for defendant concedes that an instrument, negotiable in itself, is not changed in character, or rendered nonnegotiable "by a recital of the consideration or a direction as to how the drawee shall reimburse himself," but insists that the insertion of the words "on account of" has the same effect as the words "out of the proceeds of." The controversy is thus narrowed down to whether the words "on account of contract between you and the Snyder Planing Mill Co." amount to a direction to pay out of a particular fund, or, on the other hand, are to be considered as simply indicating the fund from which the drawee, Lightner, might reimburse himself.

Many of the cases attach but little importance to the words "account of," and give the same effect to them as to the words "out of." 7 Cyc. 579. In the case of Pitman v. Breckenridge & Crawford, 3 Grat. (Va.) 127, cited by defendant, the phrase, "on account of brick work done," on a certain building, was held to be a direction to pay out of a particular fund. The case itself is of little value as an authority; it cites no cases, gives no reason, and simply holds the bill nonnegotiable. The language in Brill et al. v. Tuttle, 81 N. Y. 454, 457, 37 Am. Rep. 515 ("and charge the same to our account for labor and materials performed and furnished"), was held to be ambiguous, and other circumstances were considered as controlling. The bill was held not negotiable. The following order was held not negotiable, in Conroy v. Ferree, 68 Minn. 325, 71 N. W. 383, but the opinion merely states that the order is drawn upon a special fund without any discussion of the reasons: Starbuck, Minn., Sept. 14, 1895. T. E. Thompson and C. L. Brevig—Pay to the order of A. G. Englund one hundred fifty dollars ($150.-00) on earnings for the threshing season of 1895, whatever they may be, and charge to the account of A. H. Ferree. $150.00. Accepted Sept. 14, 1895. By C. L. Brevig."

We are of the opinion that these orders cannot be construed as drawn upon a particular fund. Beyond question, there are many authorities which hold similar expressions to indicate an intention to charge a particular fund. See Banbury v. Lisset, 2 Str. 1211; Averett's Adm'r v. Booker, 15 Grat. (Va.) 163, 76 Am. Dec. 203; Rice v. Porter's Adm'rs, 16 N. J. Law, 440; 7 Cyc. 578 (b). The weight of authority and reason supports the proposition that the words amount to no more than an indication of the fund from which the drawee is to reimburse himself. The words used are substantially the same as though the orders read "and charge to account of contract with Snyder Planing Mill Company," or "credit to account of contract," etc. The $1,000 check we consider in the same light as the order for which it was substituted.

Defendant in error argues that certain collateral circumstances

appearing in the evidence must be taken into consideration; among other things, the fact that the bank held these orders for a time after their execution as indicating the intention with which the orders were taken. It is argued that there being an ambiguity in the language, we must consider the construction placed upon these orders by the parties themselves. This case is here upon a transcript which contains none of the evidence, merely the pleadings, findings of fact and of law, the judgment and motion for a new trial. Had the trial court rested the decision upon the existence of these outside matters the findings of fact, which are very complete, would doubtless have referred to them. The conclusions of law are so framed as to leave no doubt that the court held the instruments to be nonnegotiable on account of the language used in the instruments themselves. In our view they were negotiable and the language, moreover, not even ambiguous. It follows that defendant was not entitled to recoup his damages for the failure to complete the barn; and the findings of the court, therefore, require a judgment for plaintiff for the amount due upon the order, and the $1,000 check.

The cause will, therefore, be reversed and remanded, with directions to enter judgment in favor of plaintiff. All the Justices concurring.

WHITE v. SMITH.

(Supreme Court of Illinois, 1875. 77 Ill. 351, 20 Am. Rep. 251.)

Mr. Justice SHELDON delivered the opinion of the court.

This was an action, brought by plaintiff below, as assignee, upon the following instrument in writing:

"$50.00 Monticello, Ill., April 17, 1866.

"For value received, I promise to pay to the Monticello Railroad Company, or order the sum of $50, to be paid in such installments and at such times as the directors of said company may, from time to time, assess or require. J. W. White."

The declaration averred that the directors, on the 1st of June, 1866, made an assessment of 5 per cent., which was paid; on the 7th of May, 1867, another assessment of 10 per cent., which was paid; on the 7th of January, 1868, another assessment of 35 per cent., of which there was notice to defendant, demand, and refusal of payment; and that, on January 6, 1869, another assessment of 50 per cent. was made, and like notice, demand, and refusal of payment, the several assessments amounting to the whole sum of money in the instrument mentioned, and that afterwards the instrument was indorsed and assigned to the plaintiff.

The court below overruled a demurrer to the declaration and rendered judgment for the plaintiff.

The error assigned is the overruling of the demurrer, and the question made is whether the instrument in suit is a negotiable promissory note.

Plaintiff in error asserts it not to be, because, by its terms, it is uncertain whether the money will ever become payable or not; that the payment depended on an act to be performed by the directors which act might never be performed by them, or that the railroad company, from some cause, might cease to exist before any assessment had been made by the directors.

The principle is undoubted, that, to constitute a valid promissory note, it must be for the payment of money which will certainly become due and payable one time or other, though it may be uncertain when that time will come. And where the payment depends upon a contingency, it will make no difference that the contingency does, in fact, happen afterwards, on which the payment is to become absolute, for its character as a promissory note cannot depend upon future events, but solely upon its character when created.

The instrument in question does, seemingly, depend for its payment upon a contingency. But there is a class of cases, says Judge Story, "which, at first view, seem to import that payment is to be made only upon the occurrence of events which may never happen, and yet which are uniformly held to be absolutely payable at all events. Thus, if a note be made payable at sight, or at 10 days after sight, or in 10 days after notice, or on request or on demand, in all these and the like cases the note will be held valid as a promissory note and payable at all events, although, in point of fact, the payee may die without ever having presented the note for sight, or without having given any notice to or made any request or demand upon the maker for payment. But the law, in all cases of this sort, deems the note to admit a present debt to be due to the payee, and payable absolutely and at all events, whenever or by whomsoever the note is presented for payment according to its purport." Story, Prom. Notes, § 29.

We are inclined to hold that this instrument may be regarded as one falling under this class. The money here is payable to the company in such installments and at such times as its directors may from time to time require. The directors are the managing officers of the corporation, so that the money is really payable in such installments and at such times as the payee may require. It was, in effect, payable on demand, or in installments on demand. In the case of a note payable "on having twelve months' notice," it might be said that it was not certain that notice would ever be given. In reference to a note so payable "on having twelve months' notice," Abbott, C. J., in Clayton v. Gosling, 5 Barn. & C. 360, said: "Nor is the time of payment contingent, in the strict

sense of the expression, for that means a time which may or may not arrive. This note was made payable at a time which we must suppose would arrive." The same, we think, with equal truth, may be said in respect to the present note.

We cannot well distinguish, in principle, this case from the one of Goshen Turnpike Co. v. Hurtin, 9 Johns. (N. Y.) 217, 6 Am. Dec. 273. The promise there was to pay the company $125 for five shares of the capital stock of the corporation, in such manner and proportion and at such time and place as the president, directors and company should from time to time require. It was held that the note was a good promissory note within the statute, the statute there, relative to promissory notes, being the same in substance as that of 3 & 4 Anne; that the note was payable absolutely, and not depending on any contingency; that it was, in effect, payable on demand. See, also, Dutchess Cotton Manufactory v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459.

We are disposed to hold that there was no error in overruling the demurrer, and the judgment will be affirmed.

Judgment affirmed.

WISCONSIN YEARLY MEETING OF FREEWILL BAPTISTS v. BABLER.

(Supreme Court of Wisconsin, 1902. 115 Wis. 289, 91 N. W. 678.)

This is an action in equity, brought by the respondent, a corporation, to set aside the sale and transfer to the appellant of a certain promissory note and mortgage, which was the property of the respondent, and to recover the possession of the same. The case was tried by the court, and the evidence showed that the respondent was a religious corporation organized under chapter 23 of the Private and Local Laws of Wisconsin for 1867, and had a board of six trustees, its active officers being a president, secretary, and treasurer; that said corporation never adopted any by-laws as to the management of its affairs, and had no principal office; that from time to time it received donations of money, which the trustees put in the care of the treasurer, to be loaned, and the interest to be used for the support of weak churches and indigent ministers of the denomination; that one J. F. Sears was treasurer of the corporation from the year 1896 up to June 1, 1901, when he died; that on March 15, 1901, Sears loaned to one Prisk, from the funds of the corporation, $4,800, and took a note therefor, payable to the order of "J. F. Sears, Treas., or his successor," payable five years after date, with interest at 5½ per cent.; that such note contained a power of attorney, which authorized a confession of judgment at any time thereafter, whether due or not; and said note was secured by a real estate mortgage in which the mortgagee is describ-

ed as "J. F. Sears, Treas., or his successor in office of the Wisconsin Yearly Meeting of Freewill Baptists"; that on April 22, 1901, Sears sold and delivered said note and mortgage to appellant for the sum of $4,827.13, the appellant paying therefor $3,900 in checks, and turning over to Sears two notes of $500 each, which had before that time been given by Sears to the appellant for borrowed money, Sears paying back to the appellant $133.53; that the appellant, Babler, could not read English, but that the note was read to him by Sears, and that the mortgage was present, and delivered at the same time, but was not read by Babler; that Sears converted the money which he received from Babler to his own use, and that the corporation has received no part of it; that the sale of the note and mortgage to the appellant was unauthorized, and without the knowledge of the trustees; that Babler neglected to make inquiry as to whether Sears had authority to sell the note in question.

Upon these facts the circuit court found that the defendant was negligent in purchasing the note and mortgage without inquiry; that the note was nonnegotiable; and that the plaintiff was entitled to a judgment setting aside the transfer of the note and mortgage, and adjudging that the same be delivered by the defendant to the plaintiff. From this judgment the defendant appeals.[10]

WINSLOW, J. (after stating the facts as above). It is entirely clear from the evidence in the case and from the findings of fact that the note and mortgage in question were the property of the plaintiff corporation, and that no express authority had ever been given to Sears to sell them. These being the facts, the defendant, Babler, could acquire no title to the note by his transaction with Sears unless the note was negotiable paper, or unless Sears had either the apparent ownership or apparent authority to sell it, so that the corporation would be estopped to deny the act. It is quite certain that the note was not negotiable, because by the power of attorney which it contained judgment could be entered upon it at any time after its date, whether due or not. Thus the time of payment depends upon the whim or caprice of the holder, and is absolutely uncertain. This deprives the note of its negotiability. Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100.

Chapter 356, Laws 1899 (the negotiable instrument law), provides that the negotiable character of an instrument is not affected by a provision authorizing a confession of judgment if the instrument is not paid at maturity. Section 1675—5, subd. 2. Upon familiar principles of statutory construction this provision makes a note like the present nonnegotiable. Nor can it be said that Sears had such apparent ownership or authority to sell the note as would

[10] The arguments of counsel and part of the opinion are omitted.

estop the plaintiff corporation from denying his act. The note, upon its face, shows that it was held by Sears in a representative capacity merely. * * *

Judgment affirmed.

THORP v. MINDEMAN et al.

(Supreme Court of Wisconsin, 1904. 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.)

This is an action to foreclose a note and mortgage given by the defendants Mindeman and wife to one Henry Herman, the defense being an entire want of consideration. The note was a promissory note for $6,500, dated December 11, 1900, payable three years after date, with interest at 5 per cent. per annum, semiannually, and contained the following provisions inserted before the signature: "The payment of this note is secured by a mortgage of even date herewith on real estate. If default shall be made in the payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage collateral hereto, then the whole amount of the principal shall, at the option of the mortgagee, or his representatives or assigns, (notice of such option being hereby expressly waived), become due and payable without any notice whatever."

The mortgage accompanying the note contained the following provisions: "Provided, always, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors and administrators, shall pay or cause to be paid to the said party of the second part, his heirs, executors, administrators or assigns, the just and full sum of sixty-five hundred ($6,500) dollars three years after date with interest at 5 per cent. per annum, interest payable semiannually according to the conditions of one promissory note and coupons bearing even date herewith, executed by the said George Mindeman, one of the parties of the first part, to the said party of the second part, and shall moreover pay annually to the proper officers all taxes which shall be assessed on the said premises and shall deliver or exhibit receipts therefor to said party of the second part, his heirs, executors, administrators or assigns, on or before the first day of May next after such taxes shall have become due and payable, and shall insure and keep insured the buildings thereon or to be hereafter erected against loss or damage by fire in the sum of eight thousand dollars or over, in insurance companies to be approved by the said party of the second part, his heirs, executors, administrators or assigns, such insurance to be payable in case of loss to the said party of the second part, his heirs, executors, administrators or assigns, as his mortgage interest may appear, and the policy or policies of insurance to be held by

him, and in default thereof it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, to effect such insurance, and the premiums and other legal expenses and charges paid for affecting the same, together with interest thereon at the rate of 10 per cent. per annum, shall be a lien upon the said mortgaged premises added to the amount of the said note, and secured by these presents until the payment of said note, then these presents shall be null and void. But in case of the non-payment of any sum of money (either principal, interest or taxes) at the time when the same shall become due, or of failure to insure said building agreeably to the conditions of these presents, or in case of failure to deliver or exhibit such receipt as above provided, or in case of failure on the part of said parties of the first part to keep or perform any other agreement, stipulation or condition herein contained, then in each case or all such cases, the whole amount of the said principal sum shall, at the option of the said party of the second part, his heirs, executors, administrators or assigns, which may be exercised at any time after any default, without any notice whatever to the mortgagors, or either of them, their heirs, executors, administrators, or assigns, service or giving such notice in any manner being hereby expressly waived, be deemed to have become due, and the same with interest thereon at the rate aforesaid shall thereupon be collectible in a suit at law or by foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure shall occur as aforesaid."

It appeared from the testimony of the defendant Mindeman, which was taken under objection, that the note and mortgage was given to cover advances to be made to him by Herman, but that none were ever in fact made. September 11, 1902, Herman sold the note and mortgage to the plaintiff, who was an innocent purchaser thereof, and made the following indorsement upon the note:

"For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached and numbered four to six inclusive, (previous interest coupons having been paid and surrendered), to Josephine Thorp, without recourse."

Findings and judgment of foreclosure were made and signed, and the Mindemans appeal from the judgment as well as from a subsequent order appointing a receiver.[11]

WINSLOW, J. (after stating the facts as above). The important question in this case is whether the note in suit is negotiable. The appellants argue that the note and mortgage must be construed together as one contract; that, so construed, the note requires the performance of other acts besides the payment of money, and is rendered uncertain both as to amount and time of payment, and hence is nonnegotiable.

[11] Part of the opinion is omitted.

The general rule that agreements contemporaneously executed and pertaining to the same subject-matter are to be construed together is so familiar and so frequently acted upon that it needs only to be stated. The question how far, if at all, this rule imports into a promissory note the collateral agreements contained in an accompanying mortgage, is the question to be considered in this case.

The collateral agreements contained in the mortgage, which the appellants claim are imported into the note and destroy its negotiability, are: First, the agreement that, in case of failure by the mortgagor to insure the buildings in the mortgagee's favor in approved insurance companies, the mortgagee may insure the same, and the premiums paid shall be a lien on the premises "added to" the amount of the note; and, second, the agreement that in case of failure to so insure, or to pay interest or taxes when due, or to deliver or exhibit tax receipts showing the payment of the taxes, then the whole principal shall become due at the mortgagee's option, and without notice. It will be observed that the only one of these agreements which the note contains in terms is the agreement that the principal shall become due without notice, at the option of the mortgagee, upon failure to pay interest or comply with any of the other conditions of the mortgage; but the argument is, in effect, that all of the collateral agreements in the mortgage have become a part of the note by virtue of the legal principle just stated. This is a decidedly revolutionary proposition. If it be true, both the business world and the courts have been sadly in error for many years. This court held at an early day that a note negotiable on its face retained its negotiable character notwithstanding it was secured by a mortgage upon real estate, and, when transferred before due, carried the mortgage with it relieved of all equities (Croft v. Bunster, 9 Wis. 503); and that the words "secured by real estate mortgage" upon the face of the note were not sufficient to charge the assignee with notice of any defense, nor of the terms of mortgage (Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Boyle v. Lybrand, 113 Wis. 79, 88 N. W. 904). If all the agreements contained in every mortgage are, as matter of law, imported into the note, these propositions could not be true, for the general rule (except as changed by statute) is that negotiable instruments cannot be bound up and fettered with collateral agreements for the doing of other things besides the payment of money, and retain their negotiable character.

Upon the principle contended for, the most simple real estate mortgage would deprive the note which it secures of its negotiable character, because it would import into the note one or more collateral agreements, which are not for the payment of money. Fortunately it is not necessary to give so violent a shock to the well-understood principles of law governing the negotiability of notes and mortgages. The appellants' contention really results from a confusion of ideas. They lay down the well-understood proposition that contemporaneous instru-

ments relating to the same subject-matter are to be construed together, and conclude that it follows that a note and mortgage, though separately executed, are one instrument, and that the note is that instrument. The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms; such as the payment of taxes, the insurance of houses, and the like.

While the two instruments will be construed together whenever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant.

This idea is well expressed in the case of Garnett v. Myers, 65 Neb. 280, 94 N. W. 803, where it is said: "If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterwards allowed

to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself." It may be added to this that provisions to that effect in the mortgage do not affect at all the absolute character of the promise to pay contained in the note, and hence do not affect its negotiability. A very interesting and instructive discussion of this question will be found in the opinion in the case of Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872, where the same conclusion is reached.

The propositions so far laid down seem incontrovertible if the principle is to be maintained that a note negotiable in form remains negotiable notwithstanding it is secured by an ordinary real-estate mortgage. As might be expected, we are referred to no authorities which really take issue with that principle, or squarely hold that the agreements of every mortgage are imported into the accompanying note. The nearest approach to such a holding, perhaps, is the case of Noell v. Gaines, 68 Mo. 649, where a provision in a deed of trust as to the time of payment of the debt was held to control the terms of the note in the hands of a purchaser with notice. A very vigorous and persuasive dissenting opinion was filed in this case, which forms instructive reading on this very question; but, in any event, the case does not reach the proposition that agreements in a mortgage, simply relating to the preservation of the security, are ever to be considered as imported into the note. Starting from the fundamental proposition that the ordinary negotiable note, accompanied by the ordinary real-estate mortgage with the ordinary covenants to pay taxes, etc., form two separate contracts, both being a part of the same transaction, but each relating to its own subject-matter and not interfering with the other, just as a building contract and a bond to secure its performance are separate and distinct, let us consider in what respect, if any, the note and mortgage in this case differ from the ordinary note and mortgage.

As will be seen by reference to the papers themselves, the mortgage contains conditions requiring the payment of taxes on the premises by the mortgagor; the exhibition of the receipts therefor to the mortgagee; the maintenance of insurance on the buildings in approved companies, with the right to the mortgagee to insure in case of failure of the mortgagor, the expense to be a lien on the premises "added to the amount" of the note; also a provision that in case of failure to pay interest, taxes, or insurance, or to exhibit the tax receipts, the principal sum shall, at the option of the mortgagee, become due without notice. Turning to the note, we find that it provides that, if default is made in payment of interest, or in case of failure to comply with any of the conditions or agreements of the mortgage, then the principal shall become due, at the option of the mortgagee, without notice. It will be noticed at once that none of the collateral agreements of the mortgage are in terms imported into the note except the agreement that the principal shall become due, at the mortgagee's option, in case of failure to

perform any of the agreements of the mortgage. It will be noticed also that the other collateral agreements contained in the mortgage are simply agreements providing for the due preservation of the mortgage security, and not affecting in any way either the time of payment or the amount of the note. These agreements are the agreement to pay the taxes and exhibit the receipts, the agreement to effect and maintain insurance on the buildings for the mortgagee's benefit, and the agreement that the mortgagee may insure in case of default, and have a lien on the premises "added" to the note for the premiums paid. There was, indeed, a claim made that the agreement that the premiums paid should constitute a lien added to the note meant that the note was to be increased by the amount paid, so that the amount of the note was thereby rendered uncertain; but we think it plain that the clause simply provides for the acquiring of a lien upon the premises in addition to the lien of the note. This meaning seems so obvious to us that we will spend no more time upon the suggestion.

These last-named collateral agreements, then, being simply proper agreements for the preservation of the security, and not intended nor fitted to qualify or affect in any way the absolute promises of the note, do not, upon the principles hereinbefore laid down, enter into or change the note in the least, nor affect its negotiability. Such being the case, we have only to consider the question whether the agreement that the whole principal of the note shall be due at the mortgagee's option in case of a failure to pay interest or perform any of the conditions of the mortgage renders the note nonnegotiable. Upon this question appellants place reliance upon the cases of Continental Nat. Bank of McGeoch, 73 Wis. 332, 41 N. W. 409, and W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100.

In the first of these cases, an agreement inserted in the note, providing that the payee might sell collateral securities at any time if they declined in value, and apply the proceeds, less expense of sale, on the debt, and the balance should forthwith become due, was held to make the note uncertain as to amount and time of payment, and hence nonnegotiable. In the Kimball Case, an agreement that, in case of failure to pay any installment, or of any attempt to dispose of or remove the chattel for which the note was given, the holder might declare the whole amount due, and collect same by suit or sale of the property, and, if there was a deficiency after sale, it should be payable on demand, was held to make both amount and time of payment uncertain, and hence make the note nonnegotiable. It must be admitted that both of these cases have a strong tendency to support the position of the appellants upon the proposition that the time of payment is rendered uncertain by the agreement before us. Especially is this true of the Kimball Case. In that case the uncertainty as to time resulted from the fact that, in case the giver of the note failed to pay an installment, or attempted to dispose of or remove the property sold, the holder might at once collect

the whole. In the present case the agreement is that in case of failure to pay interest or keep taxes and insurance paid the holder may at once collect the whole. In both cases the contingency depends upon the acts or omissions of the maker of the note.

We should find it quite hard, if not impossible, to differentiate the two cases were it not for the provisions of the negotiable instruments law (chapter 356, p. 681, Laws 1899), which was passed since the decisions cited, and prior to the giving of the note in question. This law gives the general requirements of negotiable paper in section 1675—1, p. 682, among which are the following: "(1) It must be in writing signed by the maker or drawer. (2) Must contain an unconditional promise or order to pay a sum certain in money. (3) Must be payable on demand or at a fixed or determinable future time." The law then provides, in section 1675—2, p. 684, that the sum is certain within the meaning of the law though it is to be paid "(3) by stated installments, with a provision that upon default in payment of any installment or of interest the whole shall become due." The law further provides, in section 1675—4, p. 686, that an instrument is payable at a determinable future time, within the meaning of the law, which is payable "(4) at a fixed period after date or sight, though payable before then on a contingency." These two provisions seem to cover this whole case, and leave really nothing to discuss. This note is payable at a fixed period after date, but may be made payable before that time upon the happening of certain contingencies which are within control of the maker. The latter clause quoted would seem to have been added to meet just such cases as the present. Such agreements as we have here are of very frequent occurrence, and it was evidently the purpose to provide for them.

The case of Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678, is also somewhat relied on by appellants, but it evidently has no bearing on the case. In that case it was held that a clause in a note authorizing the confession of judgment at any time, whether due or not, rendered the note nonnegotiable, because the time of payment depended entirely on the whim or caprice of the maker. As an additional reason for the ruling, the fact that the negotiable instruments law allows the insertion of a clause authorizing a confession of judgment if not paid at maturity was also referred to.

While we have considered this question as absolutely settled by the negotiable instruments law, it must not be supposed that we have failed to examine and carefully consider the numerous cases cited by the appellants, mostly from Western courts, as having some bearing upon this question. We have been unable to find that any of these cases really conflict with the general proposition laid down in the beginning, namely, the proposition that the ordinary provisions of a real estate mortgage requiring payment of taxes and other acts by the mortgagor for the preservation of the mortgaged property are not imported into

the accompanying note simply because the papers are simultaneously executed as a part of the same transaction. A number of them are cases decided by the Kansas Court of Appeals, and are, in substance, to the effect that, where a bond or note in terms refers to the mortgage, and declares it to be "a part of this contract," and the mortgage contains covenants to pay taxes, insure, keep buildings in repair, and the like, and that the entire sum shall become due in case of default in any of such agreements, this renders the bond or note nonnegotiable. Such are the cases of Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720; Chapman v. Steiner, 5 Kan. App. 326, 48 Pac. 607, and Wistrand v. Parker, 7 Kan. App. 562, 52 Pac. 59. It goes without saying that such cases have no bearing on the present case, because here there is no clause in the note making the mortgage a part thereof, or adopting its provisions, except the provision authorizing the whole amount to be declared due upon certain contingencies.

Another line of cases, from Nebraska, hold that, where a mortgage provides that the mortgagor shall pay the taxes levied on the mortgagee for or on account of the mortgage, this agreement destroys the negotiability of the note, because it renders the amount uncertain. Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803; Consterdine v. Moore, 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620; Allen v. Dunn, 71 Neb. 831, 99 N. W. 680. Such seems also to be the effect of the case of Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536. Without stopping to consider whether these decisions should be approved or not, it is enough to say that they are not at all in conflict with the present decision. The agreement to pay taxes was to pay taxes which might be levied on the mortgagee, not the taxes on the mortgaged property; hence the agreement had no connection with the preservation of the security, and was construed by the courts as an agreement to pay an indefinite sum as a part of the note.

In the cases of Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779, and Gilbert v. Nelson, 5 Kan. App. 528, 48 Pac. 207, notes containing stipulations very similar to those found in the present case are pronounced nonnegotiable upon what seems to us very unsatisfactory reasoning, which we feel no inclination to follow, especially in view of the positive provisions of our negotiable instruments law before cited.

The cases of Dilley v. Van Wie, 6 Wis. 209, and Elmore v. Hoffman, Id. 68, are also cited as sustaining appellants' contention, but it is evident that they do not. In the Dilley Case the note contained an express clause subjecting it to the provisions of another agreement, made on the same day, by which it appeared that the payment was subject to certain equities between the parties. The clause was rightly held to deprive the paper of its negotiable character. In the Elmore Case it was held that a collateral agreement made between the parties contemporaneously with a note, by which the payee agreed to give day of payment on the note till the happening of a certain named contingency,

was admissible in evidence to defeat an action on the note in the hands of one who purchased the note with notice of the contemporaneous agreement. We hold, therefore, that under the present negotiable instruments law the note in the present case is negotiable, and in so holding it is evident that the cases of Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409, and W. W. Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100, are overruled so far, at least, as they hold that such agreements create an uncertainty in the time of payment.

The next contention made by the appellants is that the written transfer of the note was not a commercial indorsement, but a mere assignment, and hence that the transferee took it subject to all equities. We think this contention cannot be sustained. The addition of the words "without recourse" does not impair the negotiable character of the instrument. Laws 1899, p. 701, c. 356, § 1676—8. While there is doubtless some authority tending to support appellants' claim, we think that there can be no doubt that the transfer in the present case must be held to be a commercial indorsement under the decisions of this court in the cases of Crosby v. Roub, 16 Wis. 616, 84 Am. Dec. 720; Bange v. Flint, 25 Wis. 544; Murphy v. Dunning, 30 Wis. 296. In all of these cases a negotiable note was transferred by attaching it to a negotiable bond which recited that the note was thereby "assigned and transferred" to the holder of the bond as security for the payment of the bond, there being no indorsement on the note itself; and this was held an indorsement within the law merchant. Here there is an agreement on the back of the note itself, signed by the payee, by which he sells, assigns, and transfers the note to the plaintiff. The intent to pass title and make the note transferable by indorsement and delivery afterwards seems very plain. Such, also, seems to be the current of authority. 1 Daniel, Neg. Inst. (5th Ed.) § 688c. * * *

Judgment affirmed.

IV. Payment of Money Only [12]

THOMPSON v. SLOAN et al.

(Supreme Court of New York, 1840. 23 Wend. 71, 35 Am. Dec. 546.)

This was an action of assumpsit tried at the Erie circuit, in January, 1839, before Hon. Nathan Dayton, one of the circuit judges.

The suit was brought on a note made and dated at Buffalo, in this state on the 8th of July, 1836, for $2,500, payable 12 months after date, at the Commercial Bank in Buffalo, in Canada money. The note was made by James Sloan and John Wilkeson, payable to the order of

[12] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 21–25.

Johnson, Hodge & Co., which firm was composed of E. Johnson, P. Hodge and M. F. Johnson, by the latter of whom the note was indorsed in the name of the firm. The suit was brought against the makers and indorsers jointly. The declaration contained a special count upon the note, and also the common money counts. After proving the signatures of the defendants, the protest of the note and notice to the indorsers, the plaintiff's counsel offered to read the note in evidence, to which the defendant's counsel objected, insisting that, being payable in Canada money, it was not negotiable; that Canada money meant bills of the Canada banks. The plaintiff thereupon offered to prove that, at the time of the making of the note, Sloan and Wilkeson, the makers thereof, desired to have it drawn payable in Canada bank bills, but that he objected, and insisted that it should be made payable in Canada money, which testimony was objected to, and rejected. The plaintiff thereupon, under a written consent of the defendants, read in evidence a copy of an act of the provincial Parliament of Upper Canada, passed 20th April, 1836, fixing the weight and rate of certain gold and silver coins, and declaring that the same should pass current and be deemed a legal tender in the province, in payment of all debts and demands; as thus: "The British guinea, weighing five pennyweights nine and a half grains, Troy, at one pound, five shillings and six pence; the British sovereign, weighing, &c., at, &c.; the eagle of the United States of America, coined before, &c., weighing, &c., at, &c.; the eagle of, &c., coined since, &c., weighing, &c., at, &c.; the British crown at six shillings; the Spanish milled dollar, at, &c.; the dollar of the United States of America at, &c.; the Mexican dollar at," &c., and, after reading the same, rested. The counsel for the defendant then offered to prove the meaning of the words "Canada money," as generally understood at Buffalo by persons in trade there, which evidence was objected to by the plaintiff's counsel; but the objection was overruled by the judge, and the defendants thereupon called several witnesses, who proved that Canada money was understood at Buffalo to mean bills of the Canada banks. Upon which evidence the judge ordered a nonsuit to be entered. The plaintiff asks for a new trial.

COWEN, J. A promissory note must, in order to come within the statute, like a bill of exchange, be payable in money only, in current specie (Bayl. on Bills, 10 [Am. Ed. of 1836]; Ex parte Imeson, 2 Rose, 225); or at least in what we can judicially notice as equivalent to money. Accordingly a note payable in bills of country banks (Jones v. Fales, 4 Mass. 245), in Pennsylvania or New York paper currency, current in Pennsylvania or New York (Leiber v. Goodrich, 5 Cow. 186), in notes of the chartered banks of Pennsylvania, though the note was made and payable in the state of Pennsylvania (McCormick v. Trotter, 10 Serg. & R. [Pa.] 94; see Cook v. Satterlee, 6 Cow. [N. Y.] 108, 16 Am. Dec. 432), in paper medium (Lange v. Kohne, 1 McCord [S. C.] 115; see McClarin v. Nesbit, 2 Nott & McC. [S. C.] 519), or in cash

or Bank of England notes (Ex parte Imeson, before cited, 2 Buck, 1 S. P.), has been held without the statute.

The farthest we have gone is to say that a note drawn and payable here, in New York bills or specie (Keith v. Jones, 9 Johns. 120), or in bank notes current in the city of New York (Judah v. Harris, 19 Johns. 144), is negotiable. In both cases the court went on the ground of a right to take judicial notice that New York bills, and especially bank notes current in the city of New York, were customarily considered and treated as equivalent to specie. And, in the last case, they said, though the defendant might have a right to pay with foreign bills current in the city the note was still to be regarded as payable in current money.

Admitting that the note in question imports an obligation to pay in gold and silver, current in Canada, I do not see, on what principle we can pronounce it to be payable in money, within the meaning of the rule. It is not pretended that coins current in Canada are, therefore, so in this state. As gold and silver they might readily be received, and so might the coin of any foreign country, Germany or Russia for instance; but the creditor might, and in many cases doubtless would, refuse to receive them, because ignorant of their value. In law they are all collateral commodities, like ingots or diamonds, which though they might be received and be in fact equivalent to money, are yet but goods and chattels. A note payable in either would, therefore, be no more negotiable than if it were payable in cattle or other specific articles. The fact of Canada coins being current here is not, at any rate, so notorious that we can judicially notice them as a universally customary medium of payment in this state; and if not, they are no more a part of our currency than Pennsylvania bank bills. Leiber v. Goodrich, before cited. No do I perceive in the case any proof, or offer to prove, that such coins were of universal currency.

This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. Chit. on Bills, 615, 616 (Am. Ed. of 1839); Deberry v. Darnell, 5 Yerg. (Tenn.) 451. A note payable in pounds, shillings and pence made in any country is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an instrument is to aver and prove the value of the sum expressed, in our own tenderable coin. It is payable in no other (vide Bayl. on Bills, 23 [Am. Ed. of 1836], and the cases there cited); whereas on the note in question, Canada money, a specific article, would be a lawful tender. Canada coppers, for aught I see, and, under our own decisions, bank bills commonly current in Canada, would also be tenderable.

Nor is it necessary to deny that, had this note been made, indorsed, and payable in Canada, it would have been negotiable. It would then

on its face have been payable in the current coin of the country where it was made. The objection is that the note was made, indorsed, and payable here, in a foreign commodity, which the payee was entitled to demand specifically, and to reject gold and silver current in the United States. It is of course the same thing under the extrinsic evidence offered by the plaintiff, and received by the judge. The Canadian statute merely proved what coins were current as Canada money, which could not be recognized as the money of this country. In the light of that proof, the note must be read as necessarily payable in Canada money, current by law in that province. It did not improve the case, without following it with some statute making that money, as such, current here; or, at least, showing that it was, in fact, so notoriously current among us, that we should be entitled to take judicial notice of the fact. The latter is the utmost that, by our cases, the plaintiff could claim; though we have gone farther than the cases decided in any other state or country, so far as they were cited on the argument, or have come under my observation, except a case in Tennessee. Deberry v. Darnell, 5 Yerg. 451. The instrument was payable in North Carolina notes, yet held negotiable. In McCormick v. Trotter, I fear we were somewhat justly criticised for the high ground on which we had placed all our state bills in Keith v. Jones. At any rate, Mr. Justice Duncan very truly reminded us that New York state bills had depreciated in common with those of Pennsylvania. A remark which he made as to the note in that case, which was payable in Pennsylvania bills, would, I apprehend, be nearly applicable to our own, at some stages of our currency, viz., that "it was payable in more than forty kinds of paper of different value." * * *

The motion to set aside the nonsuit, and for a new trial, is denied.[12]

HOGUE v. WILLIAMSON.

(Supreme Court of Texas, 1893. 85 Tex. 553, 22 S. W. 580, 20 L. R. A. 481, 34 Am. St. Rep. 823.)

GAINES, J. This is a question certified to us for determination by the Court of Civil Appeals for the Third Supreme Judicial district. The certificate is as follows:

"The plaintiff, Hogue, brought suit against defendant, Williamson, upon a written obligation, which reads as follows: 'Saltillo, January 25, 1888. On or before May 1, 1888, I promise to pay C. C. Hogue, or order, one thousand Mexican silver dollars. Geo. S. Williamson. $1,000 Mex.' The petition alleges that on May 1, 1888, Mexican dollars were each worth 85 cents in 'American coin,' and plaintiff asks judgment for $850. He states in his petition that the note is payable in Mexican silver dollars. The defendant filed a general denial, and also

[12] Arguments of counsel and a part of the opinion are omitted.

averred in his answer under oath that the note sued on was given for money which the plaintiff had won from defendant in a game with cards, and was therefore illegal and void.

"Upon the trial in the court below the plaintiff put in evidence the written obligation sued on, and proved that on May 1, 1888, Mexican silver dollars were worth 80 cents each. The plaintiff then rested, and the defendant introduced no testimony. The court instructed the jury to return a verdict for defendant, which was done, and judgment entered accordingly. If the instrument sued on was a promissory note, this is error. Newton v. Newton, 77 Tex. 511, 14 S. W. 157.

"With this explanation, the Court of Civil Appeals for the Third Supreme Judicial District certifies and submits to the Supreme Court for decision as part of the law of this case, as a new or novel question, the following proposition: 'Was the burden of proof on the plaintiff, after the introduction of the instrument sued on, to show nonperformance of its obligations by defendant? In other words, is the written obligation sued on a promissory note, obligating its maker to pay a certain sum of money; or is it an ordinary contract for the delivery of a certain commodity; and must the plaintiff, by affirmative testimony, show a breach of the contract?' "

We are of the opinion that the instrument in question is a promissory note. It is such in form and in substance, unless the fact that the sum payable is expressed in Mexican silver dollars should make a difference. Speaking of the sum for which a bill of exchange must be drawn, Mr. Chitty says: "It may be the money of any country." Chit. on Bills, 160. Judge Story says: "But, provided the note be for the payment of money only, it is wholly immaterial in the currency or money of what country it may be payable. It may be payable in the money or currency of England, or France, or Spain, or Holland, or Italy, or of any other country. It may be payable in coins, such as in pounds sterling, livres, tomnosis, francs, florins, etc., for in all these and the like cases the sum of money to be paid is fixed by the par of exchange, or the known denomination of the currency with reference to the par." Story on Prom. Notes, § 17. The same rule is distinctly laid down in 1 Daniel on Negotiable Instruments, § 58, and in Tiedeman on Commercial Paper, § 29b. In view of the opinion of these eminent text-writers, it is remarkable that we have found but two cases in which the question is discussed or decided.

In Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, it is held that a note made in Michigan, payable in Canada in "Canada currency," is payable in money, and is therefore negotiable. But in Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546, a note made in New York, and payable there in "Canada currency," was held not negotiable. The court, however, say: "This view of the case is not incompatible with a bill or note payable in money of a foreign denomination or any other denomination being negotiable, for it can be paid in our own coin

of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such instrument is to aver and prove the value of the sum expressed in our own tenderable coin." This decision was made in 1840, and it is to be inferred that at that time the dollar was not a denomination of the lawful money of Canada. We also infer that when the Michigan case arose this had been changed, and the denomination of Canada money corresponded with that of the United States. Upon this theory it would seem that the cases may be reconciled. The language quoted from the opinion in Thompson v. Sloan, supra, indicates clearly that, if the money named in the note had been a denomination of Canada money, the ruling would have been different, unless, perchance, the word "currency" would have affected the question. The note we have under consideration is for Mexican silver dollars—coins recognized by the laws of the United States as money of the republic of Mexico. Rev. St. U. S. § 3567 (U. S. Comp. St. 1901, p. 2376).

We conclude that the note sued upon in this case was a negotiable promissory note, and that when the plaintiff offered it in evidence, and proved the value of the Mexican dollar at the time of its maturity, he had made a prima facie case; and our opinion will be certified accordingly.

HATCH v. FIRST NAT. BANK.

(Supreme Judicial Court of Maine, 1900. 94 Me. 348, 47 Atl. 908, 80 Am. St. Rep. 401.)

On exceptions by defendant. Assumpsit upon a certificate of deposit, issued to one Olive Hodge by the defendant bank, and claimed by the plaintiff as a gift by indorsement and delivery before the death of the donor. The case appears in the opinion.

SAVAGE, J.[14] This action is brought by the plaintiff as indorsee on a certificate of deposit of the following tenor:

"The First National Bank, Dexter, Maine, Jan. 6th, 1897. Olive Hodge has deposited in this bank five hundred and sixty dollars, payable in current funds to the order of herself on return of this certificate properly indorsed. Int. at 3% per annum if on deposit 6 mos. No. 2,236. C. M. Sawyer, Cashier."

The defendant requested the presiding justice to rule that the action could not be maintained by the plaintiff, as indorsee, for the reason that the certificate of deposit in question was not a negotiable instrument. The presiding justice declined so to rule, and the defendant excepted.

[14] The statement is abridged.

The defendant contends that the instrument is nonnegotiable for three reasons: First, because it was written payable in "current funds"; secondly, because of the clause, "Int. at 3% per annum if on deposit 6 mos.;" and, lastly, because of the condition of payment expressed in the words, "on return of this certificate properly indorsed."

That a certificate of deposit, as such, is a negotiable instrument is held by almost unanimous authority (2 Daniel on Negotiable Instruments, § 1702; Miller v. Austen, 13 How. 218, 14 L. Ed. 119), and is not here denied by the learned counsel for the defendant. They only contend against certain features in the certificate before us. This court, following universal authority, has recently defined a negotiable instrument to be one which runs to order or bearer, is payable in money, for a certain, definite sum, on demand, at sight, or in a certain time, or upon the happening of an event which must occur, and payable absolutely and not upon a contingency. Roads v. Webb, 91 Me. 406, 40 Atl. 128, 64 Am. St. Rep. 246. If the certificate in question does not conform to these requirements, it must be held to be nonnegotiable.

The first objection is that it is not made payable in "money"; that "current funds," in which it is made payable, should not be judicially interpreted to mean "money." We do not think this contention should prevail. This subject has been discussed exhaustively by many courts, and the conclusions they have reached on the one side and the other are not in harmony. But we think that the modern and better doctrine is that the term "current funds," when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money, funds which are current by law as money, and that, when thus construed, a certificate of deposit payable in current funds is, in this respect, negotiable. It is well known that certificates of deposit are commonly made payable in "currency" or in "current funds," and we believe that the interpretation we have given is in accord with the universal understanding of parties giving and receiving these instruments; an understanding which we should resort to as an aid to interpretation, unless the words themselves fairly import some other meaning. Some courts hold that evidence may be received to show the meaning of the terms "currency," "current funds." But, in the absence of evidence, these courts come to opposite conclusions. For instance, in Iowa, the court holds that notes payable in currency are prima facie nonnegotiable, but that evidence may be received to prove that the word "currency" describes that which by custom or law is money, and thus the instruments may be shown to be commercial paper. Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244. On the other hand, in Michigan it was held that, where a certificate of deposit was made payable in currency, "prima facie, at least, that must be held to mean money current by law, or paper equivalent in value circulating in the business community at par." "Such, we think," said the court, "is the general

signification, the fair import, and the ordinary legal effect of the term." Phelps v. Town, 14 Mich. 374; Phœnix Ins. Co. v. Allen, 11 Mich. 501, 83 Am. Dec. 756.

Still other authorities hold that the terms "currency" or "current funds," used in commercial paper, ex vi termini mean money. Judge Campbell, in Black v. Ward, 27 Mich. 191, 15 Am Rep. 162, after a critical examination of a mass of authorities, declared that, with few exceptions, "the general course of authority is in favor of the negotiability of paper payable in currency, or in current funds; and these decisions rest upon the ground that those terms mean money, as the necessity of having negotiable paper payable in money is fully recognized."

"The term 'funds,'" say the court in Galena Ins. Co. v. Kupfer, 28 Ill. 332, 81 Am. Dec. 284, "as employed in commercial transactions, usually signifies money. Then the term 'current funds' means current money, par funds, or money circulating without any discount." Respecting an instrument payable in "current funds," the Maryland court said: "The words 'current funds,' as used in the paper before us, mean nothing more or less than current money, and, so construed, the instrument was negotiable." Laird v. State, 61 Md. 311. See, also, Miller v. Race, 1 Burr. 452, 1 Smith, Lead. Cas. 808. The Supreme Court of the United States had occasion, in Bull v. Bank, 123 U. S. 105, 8 Sup. Ct. 62, 31 L. Ed. 97, to pass upon the negotiability of an instrument which had been made payable in "current funds." That court said: "Undoubtedly it is the law that, to be negotiable, a bill, promissory note, or check must be payable in money, or whatever is current as such by the law of the country where the instrument is drawn or payable. There are numerous cases where a designation of the payment of such instruments in notes of particular banks or associations, or in paper not current as money, has been held to destroy their negotiability. But within a few years, commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver or in such notes; and the term 'current funds' has been used to designate any of these, all being current, and declared by positive enactment to be legal tender. It was intended to cover whatever was receivable and current by law as money, whether in the form of notes or coin. Thus construed, we do not think the negotiability of the paper in question was impaired by the insertion of those words." See Chrysler v. Renois, 43 N. Y. 209; Howe v. Hartness, 11 Ohio St. 449, 78 Am. Dec. 312; Citizens' Nat. Bank v. Brown, 45 Ohio St. 39, 11 N. E. 799, 4 Am. St. Rep. 526; Telford v. Patton, 144 Ill. 611, 33 N. E. 1119. The case of Klauber v. Biggerstaff, 47 Wis. 551, 3 N. W. 357, 32 Am. Rep. 773, holding that a certificate of deposit payable in currency is ne-

gotiable, is sometimes cited as distinguishing between "currency" and "current funds," but we think the distinction is more in language than in meaning, for the Wisconsin court, after carefully defining the term "currency," add: "This construction of the term 'currency' might perhaps properly be extended to the term 'current funds.' It must extend to the latter term whenever it is used in the legal sense of money."

Another contention of the defendant is that the certificate of deposit is not negotiable because it is not payable absolutely, but only contingently, "on return of this certificate properly indorsed." We think this is not such a contingency as affects the negotiability of the certificate. The language expresses no more than the law implies as the duty of the holder in the absence of any such stipulation. 2 Daniel on Negotiable Instruments, § 1707; Smilie v. Stevens, 39 Vt. 315.

Further, it is contended that this certificate is uncertain as to amount by reason of the interest clause, and therefore is not negotiable. No time of payment is mentioned in the certificate. It is accordingly payable on demand. If payment be demanded at any time within six months, the amount payable is certain; it is the face of the certificate. If payment be not demanded until after six months, the amount payable is equally certain; it is the face of the certificate and interest to the time of payment. In this respect, the certificate is like a note payable at a time certain with interest at a specified rate from the date of the note, or from maturity if it is not paid at maturity. Such notes are held negotiable. As in the case of a note on demand or on time the time when it may be actually paid is uncertain, so it is uncertain when this certificate may be presented, and payment demanded. But whenever that may be, the sum to become absolutely payable upon it at any given time is ascertainable upon its face, and that is sufficient. Smith v. Crane, 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20; Towne v. Rice, 122 Mass. 67; Hope v. Barker, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387; Crump v. Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345; 1 Daniel on Negotiable Instruments, § 53. This disposes of the exceptions relating to the negotiability of the certificate.

At the trial the plaintiff claimed that Olive Hodge, when she indorsed the certificate, gave it to her as her property, and this the defendant denied. The defendant requested the presiding justice to instruct the jury that, "if it was a mere gift made by Olive Hodge to the plaintiff in manner aforesaid, it would not authorize her (the plaintiff) to demand payment of the balance remaining unpaid represented by the certificate, but still unpaid after her (Olive Hodge's) death," which request was refused, and exception was taken.

We do not think, upon the facts stated, that this exception raises any question of law. The bill of exceptions does not state what was the "manner aforesaid" in which the gift was made. It merely states that it was "a question in dispute between the parties" whether there was a gift or not.

If there was a gift—which was a question of fact, of course—the property in the certificate remained in the plaintiff both before and after the death of Olive Hodge.

Exceptions overruled.

HODGES v. SHULER.

(Court of Appeals of New York, 1860. 22 N. Y. 114.)

Appeal from the Supreme Court. The action was against the defendants as indorsers of the following instrument or note:

"Rutland & Burlington Railroad Company.

"No. 253. $1,000.

"Boston, April 1, 1850.

"In four years from date, for value received, the Rutland and Burlington Railroad Company promises to pay in Boston, to Messrs. W. S. & D. W. Shuler, or order, $1,000, with interest thereon, payable semi-annually, as per interest warrants hereto attached, as the same shall become due; or upon the surrender of this note, together with the interest warrants not due to the treasurer, at any time until six months of its maturity, he shall issue to the holder thereof ten shares in the capital stock in said company in exchange therefor, in which case interest shall be paid to the date to which a dividend of profits shall have been previously declared, the holder not being entitled to both interest and accruing profits during the same period.

"T. Follett, President. Sam. Henshaw, Treasurer."

Judgment for plaintiff, and defendants except.[15]

WRIGHT, J. The single question is, whether the defendants can be held as indorsers. It is insisted that they cannot, for the reasons: (1) That the instrument set out in the complaint, is neither in terms nor legal effect a negotiable promissory note, but a mere agreement; the indorsement in blank of the defendants, operating, if at all, only as a mere transfer, and not as an engagement to fulfill the contract of the railroad company in case of its default; and (2) that if it be a note, the notice of its dishonor was insufficient to charge the defendants as indorsers.

Whether the blank indorsement of the defendants imports any binding contract, depends on the law of Massachusetts; in which state it is to be assumed, from the facts in the case, that the original instrument and indorsement were made. But the law of Massachusetts does not differ from that of this state or of England in any particular material to the present inquiry. In Massachusetts there has been apparently a relaxation of the common-law rule so far as to extend the remedy against indorsers to notes payable absolutely in a medium other than

[15] The statement is abridged, and a part of the opinion omitted.

cash; but in all other respects the legal rules applicable to negotiable paper are the same in that state as in our own.

The instrument on which the action was brought has all the essential qualities of a negotiable promissory note. It is for the unconditional payment of a certain sum of money, at a specified time, to the payee's order. It is not an agreement in the alternative, to pay in money or railroad stock. It was not optional with the makers to pay in money or stock, and thus fulfill their promise in either of two specified ways; in such case, the promise would have been in the alternative. The possibility seems to have been contemplated that the owner of the note might, before its maturity, surrender it in exchange for stock, thus canceling it and its money promise; but that promise was nevertheless absolute and unconditional, and was as lasting as the note itself. In no event could the holder require money and stock. It was only upon a surrender of the note that he was to receive stock; and the money payment did not mature until six months after the holder's right to exchange the note for stock had expired. We are of the opinion that the instrument wants none of the essential requisites of a negotiable promissory note. It was an absolute and unconditional engagement to pay money on a day fixed; and although an election was given to the promisees, upon a surrender of the instrument six months before its maturity, to exchange it for stock, this did not alter its character, or make the promise in the alternative, in the sense in which that word is used respecting promises to pay. The engagement of the railroad company was to pay the sum of $1,000 in four years from date, and its promise could only be fulfilled by the payment of the money, at the day named. * * *

Judgment affirmed.

VALLEY NAT. BANK OF CHAMBERSBURG v. CROWELL et al.

(Supreme Court of Pennsylvania, 1892. 148 Pa. 284, 23 Atl. 1068, 33 Am. St. Rep. 824.)

Actions on promissory notes.

The defence set up by the affidavit was that there was no technical liability as indorsers on the part of defendants, because of the non-negotiability of the notes sued on. These notes contained, in addition to the ordinary form of note, the clause which is quoted in the opinion of the Supreme Court.

The court below, Sadler, P. J., of the Ninth judicial district, specially presiding, made the rules absolute in both cases, and defendants appealed.

Errors assigned were making the rule absolute and entering judgment.

PER CURIAM, March 28, 1892:

The only question in this case was whether the note in controversy was negotiable. It is in the usual form of negotiable paper, but it is contended that its negotiability is destroyed by reason of the following provision contained therein: "Having deposited herewith a like amount of Crowell Company mortgage bonds as collateral security, which we authorize the holder of this note, upon the nonperformance of this promise at maturity, to sell either at the broker's board, or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary charges, holding us as makers and indorsers responsible for any deficiency."

We find nothing in this to destroy the negotiability of the note. While it has been truly said that a promissory note is a courier without luggage, we find nothing in the language quoted beyond the statement that the note is accompanied with certain collateral. The mere giving of collateral security with a promissory note does not destroy its negotiability: Arnold v. Rock River Valley Union R. R., 5 Duer (N. Y.) 207; Towne v. Rice, 122 Mass. 67. In Woods v. North, 84 Pa. 407, 24 Am. Rep. 201; Johnston v. Speer, 92 Pa. 227, 37 Am. Rep. 675, the amounts of the notes were held to be uncertain. In Bank v. Piollet, 126 Pa. 195, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860, the court refused to hold the indorser liable, because the time of payment was not fixed, and in Bank v. McCord, 139 Pa. 52, 21 Atl. 143, 11 L. R. A. 559, 23 Am. St. Rep. 166, the payment was made dependent upon certain conditions. In the case in hand, the amount of the note is not uncertain, nor is there any question about the time of payment. And the payment is not made dependent upon any condition whatever. The agreement, that if the collateral proves insufficient for the payment of the note, and all necessary expenses and charges, the makers will be responsible for any deficiency, neither increases nor decreases the responsibility of the makers. It merely requires them to do what the law would compel them to do without such an agreement.

We are of opinion that the affidavit of defence was insufficient and the judgment properly entered.

Judgment affirmed.

OSBORN v. HAWLEY.

(Supreme Court of Ohio, 1850. 19 Ohio, 130.)

This is a writ of error to the court of common pleas of Lorain county. The facts will be found stated in the opinion of the court.

CALDWELL, J. The action in the court below, was assumpsit. The plaintiff declared as indorsee of a promissory note made by defend-

ant for $85.00. The declaration also contained the common counts. The case being at issue, the plaintiff offered the note in evidence, which was ruled out by the court, and the plaintiff nonsuited. The refusal by the court to permit the note to go in evidence, is assigned for error. No argument is presented on either side, and the bill of exceptions only shows that the court decided that the note was not proper evidence in the cause.

On examination of the record, we do not see any objection to the note being given in evidence, and we think the court erred in ruling it out. The note has attached to it, and forming a part of the instrument a power of attorney to confess a judgment, and we presume the court may have held that that fact would prevent its negotiability. And on that presumption, we would merely remark that the power of attorney, being added to the note, does not in any way change the legal character of the note, except that it gives a more summary proceeding for its collection. It is still a promissory note, and being payable to order, is negotiable by indorsement. The power of attorney is not negotiable, and when the legal title to the note is transferred, the power of attorney becomes invalid, and no power whatever can be exercised under it, for the benefit of the indorsee; and he holds the note as if no such power had ever been attached to it.

The judgment of the court of common pleas will be reversed and the cause remanded for further proceedings.

WISCONSIN YEARLY MEETING OF FREEWILL BAPTISTS v. BABLER.

(Supreme Court of Wisconsin, 1902. 115 Wis. 289, 91 N. W. 678.)

This case is reported at page 34, supra.

FIRST NAT. BANK OF MONTGOMERY v. SLAUGHTER et al.

(Supreme Court of Alabama, 1893. 98 Ala. 602, 14 South. 545, 39 Am. St. Rep. 88.)

Action by the First National Bank of Montgomery against N. M. Slaughter and others on a promissory note. Judgment for defendants. Plaintiff appeals. Reversed.

This action was founded upon a promissory note, of which the following is a copy: "$245.00. Patsburg, Ala., July 15th, 1889. On or before the 1st day of October, 1889, for value received, the undersigned of the county of Crenshaw, state of Ala., jointly and

severally promise to pay to the order of Montgomery Iron Works two hundred and forty-five dollars, payable at 1st National Bank of Montgomery, with interest until paid, and reasonable attorney's fees, if collected by law; and we hereby waive presentment for payment, and notice of protest for nonpayment, of the same, and also waive all homestead and exemption laws as to this debt. It is also further understood and agreed that the title to the De Loach wheel and Pratt gin, for which the note is given in payment, shall remain in said Montgomery Iron Works until this note, and all interest thereon accrued, is paid in full. N. M. Slaughter. J. L. Slaughter. D. L. Slaughter. Post-office address: N. M. & J. L. Slaughter, Patsburg, Ala." The note was properly indorsed by the secretary and treasurer of the Montgomery Iron Works, and it was shown that the said note was transferred to the plaintiff in due course of trade, before maturity, for a valuable consideration.

There were several rulings of the circuit court upon the evidence sought to be introduced, to which exceptions were reserved by the plaintiff. These rulings of the lower court were based upon the idea—and the court so held—that the note sued on was not commercial paper, and that, therefore, certain evidence which was sought to be introduced, going to show a failure of consideration as to said note, and other defenses thereto, was properly allowed. There was judgment for the defendants, and plaintiff appeals.

COLEMAN, J. The instrument sued on possesses all the requisites of commercial paper. It is made payable absolutely at a designated bank, for a sum certain, and at a definite time. The fact that it contains a provision for the payment of attorney's fees, a waiver of exemptions, or the retention of the legal title to the property for which it was given as a security for the payment of the debt, does not impede its circulation or impair its validity as negotiable paper. Montgomery v. Crossthwait, 90 Ala. 553, 8 South. 498, 12 L. R. A. 140, 24 Am. St. Rep. 832; McGhee v. Bank, 93 Ala. 192, 9 South. 734. The circuit court was in error in holding that the paper, the foundation of the suit, was not commercial paper.

There are other exceptions reserved, a consideration of which would lead to a reversal of the case on other grounds, but we are of opinion that all such questions will be eliminated from the case on another trial. The holder of such paper, received in due course of trade, before maturity, for a valuable consideration, without notice, is not affected by any defense or equities which might be available to the maker against the payee; and, by the express provision of the statute of this state, "paper governed by the commercial law, negotiated before maturity, is not subject to set-off or recoupment." Code 1886, § 2684. The evidence shows that plaintiff became the owner, in due course of trade, for value, before maturity. There is no proof of notice to the plaintiff, nor of facts calculated to put him upon notice, of any defense to the note. Under such circum-

stances, the plaintiff was entitled to a verdict. Ross v. Drinkard, 35 Ala. 441; Johnson v. Bank, 88 Ala. 274, 275, 6 South. 909; Barton v. Barton, 75 Ala. 400.

Reversed and remanded.

SMITH v. MYERS.

(Supreme Court of Illinois, 1904. 207 Ill. 126, 69 N. E. 858.)

Action by Dwight L. Smith against Johnston Myers. From a judgment of the Appellate Court (107 Ill. App. 410) affirming a judgment for defendant, plaintiff appeals. Affirmed.

RICKS, J.[16] This is an appeal from the Appellate Court for the First District affirming a judgment of the circuit court of Cook county against appellant for costs in a suit brought by appellant against appellee in an action of assumpsit. The action was upon the following instrument in writing:

"Waterbury, Conn., Aug. 1, 1893. One year after date I promise to pay to the order of Norman D. Grannis thirty-five hundred dollars at the Fourth National Bank. Value received, with interest at six per cent. per annum and taxes. Due August 1, 1894. W. C. Myers."

Indorsed on the back as follows:

"Feb. 8, 1894, rec'd $532.87 on within note.

"Dec. 3, 1894, rec'd on within note $49.23.

"Dwight L. Smith, Aug. 3d, 1893.

"Rev. Johnston Myers, Cin., O., July 31, 1893.

"N. D. Grannis."

* * * * * * * * *

The contention of appellant is that the instrument sued on is a promissory note, carrying with it all the legal effects and incidents of such writing, while the appellee contends that said instrument is only an ordinary contract for the payment of money, and not a promissory note, because of the addition of the words "and taxes," following the provision for interest, and preceding the name of the maker.

If the instrument sued on is a promissory note, we think the clear legal inference from the facts shown by the record is that it was delivered at Waterbury, Conn.; and the rule seems to be that, in an action upon a negotiable instrument, the law of the place where the same is delivered and negotiated is to control in determining the liability, if any, thereon. Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76. And the place where a contract is made depends, not upon the place where it is actually written, but on the place where it is delivered, as consummating a bargain. 1 Daniel on Neg. Inst.

[16] Part of the opinion is omitted.

660. Under the statute of Connecticut, as introduced in evidence, if the instrument in question can be held to be a promissory note, the relation between appellant and appellee to the same was that of indorsers, and not of guarantors (Spencer v. Allerton, 60 Conn. 410, 22 Atl. 778, 13 L. R. A. 806), as the statute declares that, whether the indorsement be before or after the indorsement by the payee, it shall import the contract of an ordinary indorsement. If the instrument is not a promissory note, then it is clear that appellee bore no such relation to it as would render him liable under the proof disclosed in this record.

Upon a mere contract for the payment of money or the performance of any other covenant, where the instrument is not such as comes within the definition of a negotiable instrument, one by merely signing his name upon the back thereof does not become either a guarantor or an indorser, within the law merchant. There are many instruments that may be transferred by assignment of the holder or payee, and which are sometimes called "negotiable instruments," such as bills of lading, warehouse receipts, and other assignable contracts, for the performance of the terms or covenants of which one may become a guarantor; but the contract of guaranty on such instrument will not arise by the mere signing of the name of a person, not a party thereto, on the back thereof. We take it the only possible relation between the parties here, under the law, if it could be held that the instrument in question is a negotiable instrument, would be that of indorsers; and the relation of indorsers, which appellee and appellant must have borne to the instrument in question, is, in a technical sense, applicable only to a relation touching negotiable paper. While to write one's name on the back of a writing is literally to indorse it, in its technical sense, and in the sense in which it is used when applied to negotiable paper, it means writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, and is not paid by him, and such fact is duly notified to the indorser. 1 Daniel on Neg. Inst. 667. Such was the rule of the law merchant, which has been modified to some extent in this state, where such instruments are controlled by the laws of this state, by requiring that suit be timely brought, or that it be shown that suit would be unavailing.

A promissory note, as defined by the English bills of exchange act (section 83), is "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a certain sum in money to, or to the order of, a specified person or to bearer"; or as usually defined: "An unconditional promise in writing for the payment of a certain sum of money absolutely and in all events." 4 Am. & Eng. Ency. of Law (2d Ed.) 77. And as defined

by Chitty: "A promise or agreement in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer." Chitty on Bills, 516. Many definitions are given, varying only in that in some of them the parties to such instruments are specified more particularly, and the time of payment is stated in different terms; but all agree that, in order to constitute a promissory note, the instrument must be for a specified sum or certain sum of money. Lowe v. Bliss, 24 Ill. 168, 76 Am. Dec. 742.

If effect is to be given to the language of this instrument, and no part of it is to be rejected, then it is quite clear that by the addition of the words "and taxes"—which must, if they have any meaning at all, refer to the taxes upon the instrument itself, or the money loaned and represented by it—the amount of which is not fixed by the instrument, nor is there any means found in the instrument by which the amount can be fixed, and resort to extrinsic evidence being necessary to fix the same, it necessarily follows that the sum to be paid is uncertain, and the instrument is not a promissory note. Lowe v. Bliss, supra; 4 Am. & Eng. Ency. of Law (2d Ed.) 77; 7 Cyc. 596; Hill v. Todd, 29 Ill. 101; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 18 L. R. A. 428, 34 Am. St. Rep. 99; Agrey v. Fearnsides, 4 M. & W. 168; Howell v. Todd, Fed. Cas. No. 6,783; Farquhar v. Fidelity Trust & Safe Deposit Co., 13 Phila. (Pa.) 473, Fed. Cas. No. 4,676; Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Carmody v. Crane, 110 Mich. 508, 68 N. W. 268; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779; Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720; Brooke v. Strothers, 110 Mich. 562, 68 N. W. 272, 35 L. R. A. 536; Garnett v. Myers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803.

Appellant contends, however, that the word "taxes" is so indefinite and so uncertain, when read in connection with the entire instrument, that it ought to be rejected as surplusage, and, in support of that contention, refers to Hoyt v. Jaffray, 29 Ill. 104; Hill v. Todd, Id. 101; and Bilderback v. Burlingame, 27 Ill. 338. We do not think the cases cited support the contention of appellant. Lowe v. Bliss, supra, was an action by the payee against the maker of an instrument in the form of a note for the payment of a certain sum of money at the bank of Kankakee, Ill., "with current rate of exchange on New York." In that case special counts were filed in the declaration upon the note, but there was an omission to state anything in regard to the provision for the New York exchange. Objection was made to the instrument being admitted in evidence on the ground that there was a variance between it and the declaration, and that objection was overruled. On appeal to this court the judgment of the lower court was reversed, and it was held that the instrument was not a promissory note, because of the provision as to current exchange on New York, which made the

sum to be paid uncertain, as exchange varied from time to time, and in different banks and localities. In that case the note was executed and delivered in New York. In Hill v. Todd, supra, the note was delivered in Chicago, Ill., and payable at the office of the payee "in this city," and was for a certain sum of money, "with current rate of exchange." In that case it was held that, as the note was delivered and payable in Chicago, there could be no exchange when paid at the place where payment was provided for, and that the words "with current rate of exchange" could be rejected as surplusage. Hoyt v. Jaffray, supra, was upon an instrument in the form of a note, payable at Miller's Bank, Aurora, Ill., "with current rate of exchange on New York," and, following the case of Hill v. Todd, supra, the provision with reference to exchange was held to be surplusage, and the instrument a promissory note. In Bilderback v. Burlingame, supra, the action was upon an instrument reading: "Due W. B. Goddard, $450.00; to be paid in lumber when called for; in good lumber at $1.25." That instrument was held to be a promissory note, and it was further held that, as against the maker, it was not necessary to prove the consideration.

By the statute of Connecticut, if the instrument in question had been a promissory note—and, without the provision to pay taxes, it unquestionably would have been—it was subject to taxation. Howell v. Todd, supra, was a case in the United States Circuit Court in Connecticut upon a note very similar to this, and the court there said in reference to the same: "The second ground is that the amount to be paid is uncertain, for it provides for the payment not only of interest, which is certain, but also of taxes, the amount of which must necessarily be uncertain until they are assessed or imposed according to law. The instrument in question quite certainly is not a promissory note."

As has well been said by counsel for appellee, from reading the instrument it is quite as certain what subject the word "taxes" relates back to, as the word "interest." The expression, is "with interest at six per cent. per annum and taxes." There is a period after "Fourth National Bank," and the expression following is, "Value received, with interest at six per cent. per annum, and taxes." Of course, from long usage and common knowledge no one would hesitate to interpret the instrument as meaning that the interest should be paid upon the debt described in the note; and we see no reason for doubting that the intention of the parties was to contract that the maker of the note should pay the taxes on it, in addition to the principal debt and interest thereon. The provision in the instrument in Agrey v. Fearnsides, supra, was for a certain sum of money, and "all fines according to rule"; and it was insisted there, as here, that the words in quotation marks should be rejected as insensible, and therefore mere surplusage.

Park, Baron, delivering the opinion, said: "It is quite possible that they have a meaning, and may import that certain pecuniary fines or forfeitures are to be paid by the defendants; and, if so, this is certainly no promissory note, within the statute, but is a specific agreement to do certain things, the consideration for doing which not being stated, the declaration is clearly bad."

In Farquhar v. Fidelity Trust & Safe Deposit Co., supra, the instrument provided for the payment of $5,000, "together with all taxes and charges in the nature thereof that may be levied upon this note, or upon the indenture or mortgage accompanying the same, or the principal or interest moneys thereby secured, immediately upon their assessment." Speaking of this provision, the court said: "Overlooking the clause touching attorney's commission, how can it be said that the notes are either unconditional or certain in amount, in view of the stipulation for the payment of taxes, or charges in the nature thereof, assessed upon the principal or interest? Liable to taxation as the property is in the hands of the holders (and this is the import of the stipulation), in some places they would probably be free from this charge, while in others they may be subjected to indefinite and varying rates of taxation so that the amount to be paid by the maker, either before or at the maturity of the notes, would fluctuate according to collateral circumstances, and be dependent upon the domicile of the holder. And of these contemplated charges or additions to the nominal consideration, the notes themselves indicate no standard of measurement. They could only be ascertained by reference to extrinsic circumstances, and thus the amount to be paid by the maker is left indeterminate and subject to possible contention. Instruments whose consideration is thus fluctuating and indefinite, and which are laden with such embarrassments to their circulation, could not perform the functions, and therefore do not possess the character, of negotiable paper."

And so in the case at bar the instrument sued on provides for the payment of taxes. Whether the taxes shall be paid annually or semiannually, whether before the note becomes due or after, or at the time of its maturity, is uncertain. By the law merchant, and by the statutes of the states in aid thereof, negotiable instruments occupy a highly useful and valuable place in the commerce and business of our people. There is no other form of contract known that in so few words may contain so many well-understood and thoroughly established legal rights and liabilities. Their presence and use are a boon, and to destroy or to materially impair them would be a business calamity. To permit, by strange and unusual provisions, matters in no way relating to or affecting trade or commerce to be incorporated into them, unsettles established rules of construction, and makes that dangerous and uncertain which before was definite and well understood. We are unwilling to assent

to the contention that such instruments can or ought to be construed as negotiable instruments or promissory notes.

Under these views, it is unnecessary to discuss other questions urged, as this seems decisive of the case, and the judgment of the Appellate Court will be affirmed. Judgment affirmed.

THORP v. MINDEMANN.

(Supreme Court of Wisconsin, 1904. 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.)

This case is reported on page 36, supra.

LOWE v. BLISS.

(Supreme Court of Illinois, 1860. 24 Ill. 168, 76 Am. Dec. 742.)

This was an action in assumpsit. Declaration filed December 4th. Counts: (1) On a promissory note of plaintiff in error (defendant below), dated July 28, 1858, made at New York, promising "to pay Geo. Bliss & Co." (defendants in error), "plaintiffs, the sum of two hundred and twenty-two and 47/100 dollars, with the current rate of exchange on New York, for value received, in ninety days after the date thereof," alleging nonpayment. (2) The common counts for goods sold, money lent, had and received, and an account stated.

With declaration, copy of note sued on, as follows:

"$222.47. New York, July 28, 1858.

"Ninety days after date, I, the subscriber, of Aroma, county of Kankakee, state of Illinois, promise to pay to the order of George Bliss & Co., two hundred twenty-two and 47/100 dollars, at the Kankakee Bank, Kankakee, Ill., value received, with current rate of exchange on New York. David N. Lowe."

Defendant pleaded the general issue.

The issue was tried by the court, jury waived, and finding for plaintiffs below, for $227.28.

Motion for new trial overruled, and judgment for verdict and costs, and 30 days given to file bill of exceptions.[17]

WALKER, J. * * * The question is then presented whether this instrument was admissible under the common counts without proving a consideration. Promissory notes, bills of exchange, and sealed instruments, all import a consideration, and when they form the basis of an action, a consideration need neither be averred nor proved, but it is not so with other instruments. This instrument is not under seal, nor is it a bill of exchange. Was it a promissory note? That

[17] The statement is abridged, and a part of the opinion omitted.

is defined to be "a promise or agreement in writing to pay a specified sum, at a time therein limited, or on demand, or at sight, to a person therein named, or to his order, or to the bearer." Chit. on Bills, 516. Bayley on Bills, p. 1, defines a promissory note to be a written promise to pay money absolutely and at all events. And in the application of the rule the doctrine seems to be adhered to with entire unanimity, that a note or bill must be for a specific sum, or at least for a sum that may be ascertained by computation, independent of all extrinsic evidence. If an instrument be for a specified sum of money, and also for the payment of something else, the value of which is not ascertained, but depends upon extrinsic evidence, it would not be a bill or note. Had this promise been for the sum of money named, and for the value of four days' labor, no one would have supposed it to be a promissory note, because proof would have to be resorted to for the purpose of ascertaining the value of the labor, and consequently it would not be for a specified sum of money. Such a promise leaves the sum agreed to be paid wholly uncertain. We know that the current rate of exchange between commercial points is fluctuating, and subject to constant change, deepnding upon the balance of trade and other causes incident thereto. It is as subject to fluctuation as the value of labor or the price of grain, cattle, or other articles of property. And it has never been held that a court may judicially fix the price of any of those commodities independent of proof, and yet to do so, would be no more unreasonable than to take judicial notice of the rate of exchange between different commercial places. We are aware of no decision that has ever held that a court may take notice of such facts, nor has any decision been referred to which holds such an instrument to be a promissory note. Nor can it be successfully urged that custom has changed the law and rendered such instruments valid promissory notes. These instruments owe their negotiability and evidence of the receipt of a consideration to the operation of the statute, and not to the common law. Prior to the adoption of the statute of Anne, in Great Britain, and our statute regulating negotiable instruments, they, neither in that country nor in this state, possessed such qualities. And under the British statute they must be for the payment of a certain specified sum of money, and so under our statute, and not mere mutual agreements or covenants to have that effect.

Unless the instrument declared upon possesses all the qualities of a bill or note, or be under seal, if declared upon specially, a consideration must be averred and proved, or if offered under the common counts, it must be proved, to authorize a recovery. This instrument being a simple contract not under seal, and neither a note or bill, is subject to all the rules which are applied to other simple contracts. When it was offered under the common counts, as it imports no consideration, to authorize a recovery, a sufficient consideration should have been proved. When offered under the common counts, it dis-

pensed with no proof that would have been required under a properly framed special count. It, unlike a note or bill, afforded no evidence of either money lent, advanced, or had and received to the use of the plaintiff. * * *

Judgment reversed.

SMITH v. CRANE.

(Supreme Court of Minnesota, 1885. 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20.)

Plaintiff, as indorsee for value and before maturity, brought this action in the municipal court of Mankato upon the promissory note set out in the opinion. The answer denies that the note is negotiable, denies that plaintiff is the holder and owner of the note, denies that it was transferred before maturity, alleges that it was given, with two other notes, in payment for a harvester and binder which was accompanied with a written warranty, alleges a breach of the warranty and a return of the harvester and binder in accordance with the provisions of the warranty, and asks that the damages for the breach be set off against the note. * * *

The court also charged, against plaintiff's objection, that "the instrument offered in evidence (the note in suit) is not a promissory note, but is subject to all equities existing between the defendant and D. M. Osborne & Co., whether it was assigned before or after maturity." Defendant had a verdict, and plaintiff appeals from an order refusing a new trial.[18]

BERRY, J. "$100. Good Thunder, July 24, 1882. For value received on or before the first day of January, 1884, I, or we, or either of us, promise to pay to the order of D. M. Osborne & Co. the sum of one hundred dollars, at the office of Gebhard & Moore, in Mankato, with interest at ten per cent. per annum from date until paid; seven, if paid when due. W. J. B. Crane." A negotiable promissory note must be certain as to amount. Jones v. Radatz, 27 Minn. 240, 6 N. W. 800. It is so certain when the sum to become absolutely payable upon it at any given time is ascertainable upon its face. 1 Daniel, Neg. Inst. § 53; Towne v. Rice, 122 Mass. 67; Jones v. Radatz, supra.

The defendant's position is that the foregoing instrument is rendered uncertain as to amount by the interest clause, and therefore is not a negotiable promissory note. As to the legal effect of such a clause the authorities disagree. Some hold that the contract reserves the higher rate of interest, with a provision for its abatement, upon a condition to be performed, and that, therefore, the difference between the two

[18] The statement is abridged, and a part of the opinion omitted.

rates is not a penalty, but the contract is to be enforced according to its literal terms. The cases holding this view rest upon Nicholls v. Maynard, 3 Atk. 519. See Walmesley v. Booth, Barn. Ch. 478, 481; Bonafous v. Rybot, 3 Burr. 1370; Waller v. Long, 6 Munf. (Va.) 71. Other authorities hold that the clause is the same in effect as if it had reserved the lower rate of interest, with a provision that if the indebtedness is not paid at maturity, interest shall run at a higher rate. Seton v. Slade, 7 Ves. 265. And see Stanhope v. Manners, 2 Eden, 197; Brockway v. Clark, 6 Ohio, 45; Longworth v. Askren, 15 Ohio St. 370; Brown v. Barkham, 1 P. Wms. 652. If this be the true construction of the clause, it is generally agreed that the difference between the two rates is to be treated as a penalty. Talcott v. Marston, 3 Minn. 339 (Gil. 238); Newell v. Houlton, 22 Minn. 19; and cases last cited.

In our opinion the view taken by the authorities last mentioned, as to the legal effect of the interest clause under consideration, is the more sensible, and most in accordance with what would seem to be the real object of the parties to the contract. What the payee really wants is his money at the due date of the contract, and to secure this he holds an increase of the rate of interest over the debtor's head. In other words, the increase is a penalty for the debtor's delinquency. Treating the increase as a penalty, it follows, under the decisions of the court before cited, that the note in suit will in law draw the same rate of interest before as after maturity—that is to say, 7 per cent.—and that, therefore (whatever might be the case if the interest clause were upheld according to its literal terms), the sum absolutely payable upon the instrument at any given time is thus made certain as the principal, and 7 per cent. interest. * * *

Order reversed, and new trial granted.

V. Specification of Parties [19]

TAYLOR v. DOBBINS.

(Court of King's Bench, 1720. 1 Str. 399.)

In case upon a promissory note, the declaration ran, that the defendant made a note, et manu sua propria scripsit. Exception was taken, that since the statute he should have said that the defendant signed the note, but the court held it well enough, because laid to be wrote

[19] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 26-30.

with his own hand, and there needs no subscription in that case, for it is sufficient his name is in any part of it. I, J. S., promise to pay is as good as I promise to pay, subscribed J. S.

PETO v. REYNOLDS.

(Court of Exchequer, 1854. 9 Exch. 410.)

Assumpsit. The first count charged the defendant as acceptor of a bill of exchange. The second charged him as a maker of a promissory note.

Pleas, to the first count, that the defendant did not accept the bill; to the second count, that the defendant did not make the note. Issues thereon.

At the trial, before Talfourd, J., at the last Bristol assizes, it appeared that the defendant was a merchant at Bristol and owner of a vessel called the "Mary," which, in April, 1852, had sailed from that port to the coast of Africa under the command of one Righton. The plaintiff was treasurer of a foreign missionary society, and the registered owner of a vessel called the "Dove," which had been sent by that society to the coast of Africa. Whilst Righton was at Cameroons in Africa, he there saw the Dove, and agreed with one Saker, an agent of the missionary society, to purchase that vessel for £300, for the purpose of loading the Mary. He paid £100, and, in respect of the residue, Saker drew the following bill in sets:

"Cameroons, September 3, 1852.

"Exchange for £200.

"At sight of this my third of exchange, the first and second of the same tenor and date being unpaid, please to pay to S. M. Peto, Esq., or order, the sum of two hundred pounds sterling for value received, and place the same, as by letter of advice of 3d September, to the account of Alfred Righton."

Across the face of the bill Righton wrote the defendant's acceptance, as follows: "Accepted. Samuel Reynolds, Esq., Shorn Lane, Bedminster, Bristol."

A witness for the plaintiff stated that, in January, 1853, he presented the above bill to the defendant, who denied the authority of Righton to accept bills in his name, but nevertheless promised to pay this bill. It was not, however, clear from the testimony of the witness, whether the defendant had made an absolute promise to pay, or a conditional promise to pay at a future period. The defendant, who was called, denied that he had absolutely promised to pay the bill.

It was objected, on the part of the defendant, that there could be no valid acceptance of a bill which was not addressed to any one. The learned judge told the jury that, if they believed from the evidence that the defendant made an absolute and unconditional promise to pay

the bill, that would amount to a parol acceptance of it. The jury found a verdict for the plaintiff on the first count, for the amount of the bill and interest, and for the defendant on the second; leave being reserved to the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly,[20]

PARKE, B. I think that there ought to be a new trial, because the evidence, as to the acceptance of the bill, is unsatisfactory. At the next trial, the parties will have an opportunity of putting on the record the question whether this instrument is a bill of exchange; and therefore it is not necessary to express any decided opinion on the point. I cannot, however, help observing that, with the exception of Regina v. Hawkes, there is no case in which it has ever been decided that an instrument could be a bill of exchange where there was not a drawer and a drawee. With respect to that case, it does not seem to me entitled to the same weight of authority as a decision pronounced in the presence of the public, and on reasons assigned after hearing an argument in public. I must own that, but for that case, I should have had no doubt that the law merchant required that every bill of exchange should have a drawer and a drawee. This instrument, though in the form of a bill, is not addressed to any one, for I think it impossible to consider the acceptance as an address; but I do not see why the instrument may not be treated as a promissory note, because, upon the face of it, there is a promise to pay the amount written in the name of Samuel Reynolds. Then, if the authority to subscribe his name has been subsequently ratified, that amounts to a promise by him. Therefore, if, on the next trial, there is satisfactory evidence to show that the defendant absolutely promised to pay the amount mentioned in the instrument, he will be liable as upon a promissory note.

MARTIN, B. I am of the same opinion. The verdict is unsatisfactory, and therefore there ought to be a new trial. With respect to the matter of law, if it were necessary to express a decided opinion, I should concur with my Brothers PARKE and ALDERSON. It seems to me that it is absolutely essential to the validity of a bill of exchange, that it should have a drawer and a drawee; and, except for the case of Gray v. Milner, I should have doubted whether the making a bill payable at a particular place was a sufficient address. However, assuming that in this case the defendant made an absolute promise to pay, why may not this instrument be treated as a promissory note? A promissory note need not be in any particular words. Here there is a request to pay a sum of money; then a person accepts that in the name of Samuel Reynolds, which acceptance is a direct engagement to pay. The person so accepting is not Samuel Reynolds, but a person who professes to do it with Samuel Reynolds' authority. Then, if one man professes to make a contract on behalf of another, and that other

[20] Arguments of counsel are omitted, and the statement is abridged. Pollock, C. B., and Alderson, B., also delivered opinions.

adopts it, it is the same as if he had made it himself. Therefore, if there was evidence of an absolute undertaking by Samuel Reynolds to pay, this instrument is his promissory note.

Rule absolute.

FAIRCHILD v. OGDENSBURGH, C. & R. R. CO.

(Court of Appeals of New York, 1857. 15 N. Y. 337, 69 Am. Dec. 606.)

Appeal from a judgment of the Supreme Court. The complaint set forth that the defendant was a corporation, under the general railroad act, and that the plaintiffs were partners engaged in the construction of portions of the defendant's road, "and that heretofore, to wit, on the 10th day of May, 1855, the said defendant was indebted to said plaintiffs in the sum of $300, for work done by said plaintiffs for said defendant on section number eighteen of defendant's railroad and the defendant, by its president, John Stryker, thereto duly authorized, then and there drew its certain draft or order in writing, dated on the day last aforesaid, and addressed to Rowland S. Doty, treasurer of said defendant, directing the said treasurer to pay to said plaintiffs under the firm name of Fairchild, Hopkins & Walker $300, being the amount due them for work on section number eighteen, according to engineer's estimate for January, 1855, thereunto prefixed, and then and there delivered the said draft or order to the said plaintiffs; and the said plaintiffs say that the said draft or order was duly presented to the said Rowland S. Doty, treasurer as aforesaid, and payment thereof duly demanded, but the same has not been paid; and the defendant is justly indebted to the plaintiffs thereon, in the sum of $63.53 and interest, from the 10th day of May, 1855." There were five other drafts set forth in the same manner; and the complaint concluded by a demand for judgment for the aggregate amount alleged to be due on them all.

The answer of the defendant was a denial, in respect to each of the drafts, that they had been presented to Mr. Doty, the treasurer, and that payment had been demanded.

The plaintiffs applied for judgment, on the ground of the frivolousness of the answer, and such judgment was given in their favor. On appeal to the general term, this judgment was affirmed, and the defendant appealed to this court.

DENIO, C. J. The complaint contains a distinct averment of an indebtedness by the defendant to the plaintiffs, for work and labor to an amount equal to the sum claimed.

The paper which it is alleged was given for this indebtedness was not a bill of exchange. The idea of a bill, under the law merchant, supposes the existence of a party other than the drawee, to whom the bill is addressed, and who is therein requested to pay the amount to the holder on account of the drawer. Here the party with whom the plaintiffs dealt, was the corporation which, being an artificial per-

son, could only act by agents. The president was one agent, and the treasurer was another, and as a convenient method of keeping the accounts, the former, whose duty it was to adjust the claims for labor, made his warrant in favor of the plaintiffs on the treasurer, who was entrusted with the duty of keeping the money and paying it out on proper vouchers. Both the drawee of the order and the party to whom it was addressed represented the corporation; and neither incurred, or were expected to incur, any personal obligation. The default of either in performing any duty respecting the order would be the default of the corporation, and would not subject either of them to any individual liability. The giving of the order for the debt of the corporation was a method suggested by motives of convenience for transacting its business, and keeping its accounts. To require of the holder of such a draft the kind of diligence which the law exacts of the holder of commercial paper would be a perversion of its object. It is argued by the defendant's counsel that the plaintiffs having taken a draft on the defendant's treasurer, for his debt, they must be understood to have assented to their forms of doing business, and should be holden to make a presentment of the draft before suing the company. It would certainly be wrong to allow the creditor in such a case to subject the company to costs, when the funds are ready, and when the money would be paid upon the presentation of the paper. But the answer to the argument is that the creditor will be defeated in his action, as to damages and costs, if the company is able to show that its treasurer was furnished with funds, and would have paid the demand if he had been called on. It becomes, then, a question as to the onus probandi. In Wolcott v. Van Santvoord, 17 Johns. 248, it was settled, upon much consideration, that in an action against the acceptor of a bill, or the maker of a note, payable at a particular place, it is not necessary for the plaintiff to aver or prove a demand of payment at the time and place appointed. This has been considered the unquestioned law ever since the judgment in that case, a period of nearly forty years. After such an acquiescence in a principle of such constant application, and which relates to the most practical of subjects, the effect of commercial paper, we cannot listen to the suggestion of the defendant's counsel, that the prior cases in England are the other way. If, upon examination, we found them to be so, we should not depart from the rule as we find it settled and universally acted on in this state.

The drafts which the plaintiffs received for their debt against this corporation are in the nature of promissory notes, payable at the office of the treasurer of the company. Though in the form of bills, they contain an acknowledgment in writing of their indebtedness to the plaintiffs in the amounts mentioned in them, and an undertaking in effect to pay these amounts at the treasurer's office. In Miller v. Thomson, 3 Manning & Gr. 576, the court of common pleas, in England, determined that an instrument in the form of a bill of exchange,

drawn upon a joint stock bank, by the manager of one of its branches, by order of the directors, might be declared upon as a promissory note. The Chief Justice said there was the absence of the circumstance of there being two distinct parties as drawer and drawee, which, he said, was essential to the constitution of a bill of exchange. That being so, he added, the only alternative is that this instrument is a promissory note, and is properly declared upon as such.

We adopt the principle of this case, which is strictly applicable to the one before us. The issue, therefore, which was joined upon the question whether these orders had been presented for payment, was an immaterial one, and the Supreme Court was right in its judgment.

FORWARD v. THOMPSON et al.

(Court of Queen's Bench, Upper Canada, 1854. 12 U. C. Q. B. 103.)

Assumpsit on an instrument in the following words:

"£228. 7s. 6d. Port Hope, December 8, 1853.

"Three months after date, pay to the order of William Thompson, at Port Hope, the sum of two hundred and twenty-eight pounds, seven shillings, and six pence, currency, for value received.

"[Signed] John Thompson."

This was declared upon as a promissory note, made by John Thompson in favor of the defendant William Thompson, who was stated to have indorsed to the defendant John Thompson, who indorsed to the plaintiffs.

Pleas denying the making and indorsing, and other pleas not material to mention.

At the trial at Cobourg, before McLean, J., it was objected that the instrument produced was not a promissory note. Several other objections were raised; but it is only material to notice the one on which the judgment of the court proceeded.[21]

DRAPER, J., delivered the judgment of the court.

The first question to be decided is whether the instrument declared upon in point of law amounts to a promissory note.

The authorities cited (to which may be added Russell v. Powell, 14 M. & W. 418, and Peto v. Reynolds, 18 Jur. 472) establish clearly, as we think, that it could not have been treated and declared upon as a bill of exchange for want of a drawee; and, if not, then those cases which have been decided on the ground that the instrument in question is made in terms so ambiguous as to make it doubtful whether it be a bill of exchange or promissory note, have no application. Then as a promissory note it wants the very essence of a promissory note, that which mainly distinguishes it from a bill of exchange, viz., a promise in terms by the maker, which makes

[21] Arguments of counsel are omitted.

him primarily liable to pay the money. Here are the proper words used, and no others, for drawing a bill of exchange, and if there had been a drawee there would have been no room whatever for treating the instrument as anything but a bill of exchange. But for want of a drawee it is incomplete as a bill of exchange; and for want of a promise it appears to us incomplete as a note. It is quite true that no particular words are indispensable, but that any form of words from which the court can extract an expressed intention to promise to pay are sufficient; but in this case we see nothing but an omission to complete, by adding a drawee's name, what in all other respects is a good bill of exchange, and we cannot find either reason or authority for holding that this is sufficient to convert it into a promissory note.

Rule absolute.

ALMY v. WINSLOW.

(Supreme Judicial Court of Massachusetts, Bristol, 1879. 126 Mass. 342.)

Contract on the following instrument, declared on as a promissory note:

"New Bedford, April 26, 1870.

"On demand, with interest for value received, please pay Charles Almy, or order, fifty-five and $^{33}/_{100}$ dollars.

"George F. Winslow.

"Witness: Asa C. Smith."

Writ dated March 28, 1877, and returnable to the superior court. The defendant demurred, on the ground that the declaration set forth no legal cause of action. The court overruled the demurrer, and the defendant alleged exceptions.

The defendant then filed an answer, admitting the execution of the paper declared on, and that the same was for a valid consideration, and alleging that the cause of action did not accrue within six years. At the trial, before Gardner, J., without a jury, the judge ruled that the instrument declared on was a witnessed promissory note, and was not barred by the statute of limitations, and ordered judgment for the plaintiff. The defendant alleged exceptions.[22]

SOULE, J. The only question in this case is whether the instrument sued on is or is not a witnessed promissory note. That it is witnessed is admitted. The controversy is as to the legal effect to be given to its terms. It does not purport to be a mere acknowledgment of the existence of a debt, and is admitted to have been given for a valuable consideration. It is in the form of a draft or bill of exchange, except that it is not addressed to or drawn upon any one, and therefore lacks one essential characteristic of a bill. It

[22] Part of the opinion is omitted.

is not in the ordinary form of a promissory note, for it is not in express terms a promise, but a request to pay. It is familiar law, however, that no particular form of words is necessary to constitute a promissory note. There need not be a promise in express terms; it being sufficient if an undertaking to pay is implied in the contents of the instrument. Daggett v. Daggett, 124 Mass. 149; Franklin v. March, 6 N. H. 364, 25 Am. Dec. 462; Carver v. Hayes, 47 Me. 257; Russell v. Whipple, 2 Cow. (N. Y.) 536; Brooks v. Elkins, 2 M. & W. 74.

The instrument sued on was intended by the parties to take effect as a contract. The language imports this; and no other inference can be drawn from the fact that it was given for value. It cannot operate as a draft, check, or bill of exchange, because there is no drawee. One who signed an acceptance on it would not be liable as acceptor of a bill. Peto v. Reynolds, 9 Exch. 410. To be operative at all, as a contract, it must be as a promissory note. It was said in Edis v. Bury, 6 B. & C. 433, by Lord Tenterden, that, "where a party issues an instrument of an ambiguous nature, the law ought to allow the holder, at his option, to treat it either as a promissory note or a bill of exchange." In that case the instrument was in the form of a promissory note, but had been accepted by a person whose name had been written on the corner of the paper at which the name of the drawee of a bill is usually placed. The maker, being sued, contended that he was discharged for want of notice of dishonor as drawer of a bill. The court decided otherwise. To the same effect is the decision in Lloyd v. Oliver, 18 Q. B. 471. It has been repeatedly held that, where the drawer and drawee of an instrument in the form of a bill of exchange are the same person, it may be declared on as a promissory note. Miller v. Thomson, 3 Man. & Gr. 576; Allen v. Sea Assur. Co., 9 C. B. 574; Fairchild v. Ogdensburgh, etc., Railroad, 15 N. Y. 337, 69 Am. Dec. 606. The reason is obvious. The drawer of a bill on another assumes only a conditional liability. His contract is that he will pay if duly notified of dishonor of the draft; but when the drawer is the drawee too, such notice would be an empty form, and his undertaking is not conditional, but absolute. The doctrine of the cases cited above on this point is recognized and approved in Commonwealth v. Butterick, 100 Mass. 12.

In view of the foregoing authorities, there seems to be no injustice in holding that an instrument in the form of that sued on is to be regarded, in passing upon the rights of the signer and the payee, as a promissory note. The signer, having made the instrument in the form of a bill of exchange, but without addressing it to any one as drawee, may properly be held to have intended to assume the absolute liability to pay, which he would have assumed if he had addressed the instrument to himself. Any other view makes the instrument valueless. It does not contain anything

which informs the payee what is to be done in order to fix the liability of the signer. If the undertaking of the signer is not absolute, it is nothing. * * *

We are of the opinion that the instrument sued on was in legal effect a promissory note, and that, being duly attested, action on it was not barred by the statute of limitations.

Exceptions overruled.

GORDON v. LANSING STATE SAVINGS BANK.

(Supreme Court of Michigan, 1903. 133 Mich. 143, 94 N. W. 741.)

Assumpsit by Gordon against the bank to recover the balance of a deposit. From a judgment for plaintiff, defendant brings error

MOORE, J. This case was tried by the circuit judge without a jury. At the request of the defendant, he made a finding of facts, which is as follows:

"Monday morning, December 9, 1901, at about 9 o'clock, there was presented at the bank of defendant at the city of Lansing for payment the following check, made upon the printed form of check supplied by defendant to its patrons, and signed by plaintiff, viz.:

"'Lansing, Mich. 190 No.

"'Lansing State Savings Bank of Lansing.

"'Pay to the order of ..... Nine Hundred and Seventy Dollars—$970.00. Jno. R. Gordon.'

"The check was indorsed by Charles P. Downey, and was presented by an employé of Mr. Downey, and cash was paid at the time of its presentation. The plaintiff had been a depositor at defendant's bank at periods for three or four years, and at the opening of the bank on the morning of December 9, 1901, his balance or credit upon the books of the bank was $3.40, but during the day $2,997.50 was added to plaintiff's credit. The day defendant cashed the check plaintiff was at the bank, and was informed that the check for $970 had been cashed by payment to Mr. Downey, and he then notified defendant he would not accept that check as a voucher for the money paid. December 14, 1901, plaintiff prepared and presented to defendant his check, payable to himself, for $970, being the amount he claimed to then have on deposit in the bank. Payment on this check was refused by defendant upon the ground that plaintiff had no funds in the bank."

The circuit judge rendered a judgment in favor of the plaintiff for $970 and interest. The case is brought here by writ of error.

Two questions are discussed by counsel: First, the effect of not dating the check; second, has the check a payee? We do not deem it necessary to discuss the first question.

As to the second question, it will be noticed the drawer of the

check did not name a payee therein, nor did he leave a blank space where the name of a payee might be inserted, nor did he name an impersonal payee. In the case of McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410, the court used the following language: "A check must name or indicate a payee. Checks drawn payable to an impersonal payee, as to 'Bills Payable' or order, or to a number or order, are held to be payable to bearer, on the ground that the use of the words 'or order' indicates an intention that the paper shall be negotiable; and the mention of an impersonal payee, rendering an indorsement by the payee impossible, indicates an intention that it shall be negotiable without indorsement—that is, that it shall be payable to bearer. So, when a bill, or note or check is made payable to a blank or order, and actually delivered to take effect as commercial paper, the person to whom delivered may insert his name in the blank space as payee, and a bona fide holder may then recover on it. These cases differ essentially from the one at bar. In the latter case the person to whom delivered is presumed, in favor of a bona fide holder, to have had authority to insert a name as payee. In the former cases the instrument is, when it passes from the hands of the maker, complete, in just the form the parties intend. But in this case there is neither a blank space for the name of the payee, indicating authority to insert the payee's name, nor is the instrument made payable to an impersonal payee, indicating a fully completed instrument. It is claimed that the words 'on sight' are such impersonal payee. They were inserted, however, for another purpose—to fix the time of payment, and not to indicate the payee. It is clearly the case of an inadvertent failure to complete the instrument intended by the parties. The drawer undoubtedly meant to draw a check, but, having left out the payee's name, without inserting in lieu thereof words indicating the bearer as a payee, it is as fatally defective as it would be if the drawee's name were omitted." See, also, Rush et al. v. Haggard, 68 Tex. 674, 5 S. W. 683; Prewitt v. Clrapman, 6 Ala. 86; Brown v. Gilman et al., 13 Mass. 160; Rich et al. v. Starbuck, 51 Ind. 87; Norton, Bills & Notes (3d Ed.) p. 59, and notes; 1 Daniel, Neg. Inst. (4th Ed.) § 102.

The case differs from the one at bar in some respects, but the important part of the decision is that a payee is necessary to make a complete instrument, and, even though the maker of the check may have intended to name a payee, if he has not in fact done so the check is incomplete. In the case at bar the failure to name a payee was not an oversight, if we may judge from what Mr. Gordon did, as will appear more in detail later.

Our attention has been called to Crutchly v. Mann, 5 Taunt. 529. In this case the bill of exchange was made payable to the order of ..... The court found that, under the facts shown, the conclusion was irresistible that the name was filled in with the

consent of the drawer. The same case was previously reported in 2 Maule & S. 90 (Cruchley v. Clarance), where, as the case then stood, it appeared the bill of exchange had been sent out, the defendant leaving a blank for the name of the payee. One of the judges was of the opinion that the defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill of exchange; another judge was of the opinion that it was as though the defendant had made the bill payable to bearer; while the third judge was of the opinion that the issuing of the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

In the case of Harding v. State, 54 Ind. 359, a promissory note was drawn, leaving a blank space for the name of the payee; and it was held: "So the name of the payee may be left blank, and this will authorize any bona fide holder to insert his own name. 1 Pars. Notes & B. 33." In the case of Brummel v. Enders, 18 Grat. (Va.) 873, promissory notes blank as to the names of the payees had been put in the hands of an agent to be sold for the benefit of the makers. The agent sold them, at a greater discount than the legal rate of interest, to purchasers who did not know they were sold for the benefit of the makers. At the time of the sale the names of the purchasers were inserted, either by the purchasers or by the agent, in the blank left for the payee. When the notes were sued the makers pleaded usury. The court, following the cases already cited, held that any bona fide holder of a bill or note which is blank as to the name of the payee may insert his own name and thus acquire all the rights of the payee.

It will be observed that the case at bar differs from all of these cases. As before stated not only did Mr. Gordon fail to insert the name of a payee, or to leave a blank where the name of the payee might be inserted, but he did more. He drew a line through the blank space making it impossible for any one else to insert therein a name, indicating very clearly that he not only declined to name a payee but intended to make it impossible for any one else to do so. Had Mr. Gordon issued a check otherwise perfect, but with the blank space for the amount of the check unfilled, and delivered it to a third person it would be presumed the third person was given authority to fill the blank space. But had he, instead of leaving the space a blank filled it by drawing a line through it, would any one say the third person might then insert a sum of money in that space? If not, upon what principle may the name of a payee be inserted when the space was filled in the same way, or upon what theory may it be presumed there was an impersonal payee when the maker has not made the check payable to cash or some other impersonal payee? In order to construe the check as a complete instrument, we must read into it an intention not only not expressed by its language, but contrary to the act of the maker. The check, as it appears to-day, is without any payee. The record is silent

in relation to whom it was delivered, or whether the person who presented it at the bank or the person whose indorsement it bears was a bona fide holder.

Judgment is affirmed.

HOOKER, C. J., concurred with MOORE, J.

CARPENTER, J. I regret that I cannot concur in the opinion of my Brother MOORE. I agree with him that the check in question is not governed by the authorities which hold that, where a blank is left for the insertion of the name of a payee, the instrument is to be treated as payable to bearer. I cannot agree, however, that the case of McIntosh v. Lytle, 26 Minn. 336, 3 N. W. 983, 37 Am. Rep. 410, is controlling. That case resembles this in many particulars. There is, however, a difference which, in my judgment, renders the reasoning of that case inapplicable. The fact that the plaintiff in the case at bar used the ordinary blank, and drew a line through the space intended for the name of the payee prevents our assuming, as did the court there—and its decision was based on this assumption—that it is "the case of an inadvertent failure to complete the instrument intended by the parties." The instrument under consideration is obviously complete, in just the form the maker intended.

In my judgment, the authorities which hold a check payable to the order of an impersonal payee to be valid and negotiable control this case. I quote from the case of Willets v. Bank, 2 Duer (N. Y.) at page 129: "One of the checks was payable to the order of 1658, the other three to the order of bills payable; and, as the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an indorsement, is, in judgment of law, payable to bearer. Vere v. Lewis, 3 Term R. 183; Minet v. Gibson, Id. 481; Gibson v. Minet, 1 H. Black, 569, affirmed in the House of Lords. And it seems to us quite manifest that in principle these decisions embrace the present case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and, consequently, were payable to bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud."

In Mechanics' Bank v. Straiton, 3 Abb. Dec. (N. Y.) 269, a check payable to bills payable or order was held payable to bearer, the court saying: "By naming the persons to whose order the instrument is payable, the maker manifests his intention to limit its negotiability by imposing the condition of indorsement upon its first transfer. But no such intention is indicated by the designation of a fictitious or impersonal payee, for indorsement under such circumstances is manifestly impossible; and words of negotiability, when used in connection with such designations, are capable of no reasonable interpretation except

as expressive of an intention that the bill shall be negotiable without indorsement—i. e., in the same manner as if it had been made payable to bearer."

We must decide that the check in the case at bar, like those in the cases cited, is either altogether void, or is transferable by delivery. I submit that we should follow those cases, and decide that it is transferable by delivery. To quote the language of Lord Ellenborough, in Cruchley v. Clarance, 2 Maule & S. 90: "As the defendant has chosen to send the bill [check] into the world in this form, the world ought not to be deceived by his acts." This view of the case compels me to notice the fact that the check under consideration is not dated. According to the weight of authority, this omission does not invalidate it. See Zane, Banks, § 152; 2 Daniel, Neg. Inst., § 1577; Norton, Bills & N. (3d Ed.) p. 405, note.

I think the judgment of the court below should be reversed, and a judgment entered in this court for the defendant.

GRANT, J., concurred with CARPENTER, J. MONTGOMERY, J., did not sit.

SEABOARD NAT. BANK v. BANK OF AMERICA.

(Court of Appeals of New York, 1908. 193 N. Y. 26, 85 N. E. 829, 22 L. R. A. [N. S.] 499.)

Action by the Seaboard National Bank against the Bank of America. From a judgment of the Appellate Division (118 App. Div. 907, 103 N. Y. Supp. 1141), affirming a judgment for plaintiff at the Trial Term (51 Misc. Rep. 103, 100 N. Y. Supp. 740), and an order denying a new trial, defendant appeals. Affirmed.

Three persons doing business under the firm name of E. V. Babcock & Co., at Pittsburg, Pa., were depositors in the Federal National Bank of that city. One Pennock was the auditor and chief bookkeeper, and known by said bank to be in the employ of said firm. On September 17, 1904, said Pennock went to said bank, and presented a check purporting to be signed by said firm, drawn upon said bank, payable to the order of "N. Y. Draft," for $2,000, and requested said bank to give him a New York draft for $2,000, payable to the order of "Carroll Bros." A draft was drawn by said bank upon the plaintiff, a banking institution in the city of New York, and delivered to said Pennock. Said Pennock thereupon went to the Mellon National Bank of Pittsburg, Pa., in which bank he had a personal account, and he thereupon signed the name of "Carroll Bros." on the back of said draft, and deposited the same to his account in said Mellon National Bank. The draft was indorsed by the Mellon National Bank, and forwarded to its correspondent, the defendant, in the city of New York. The defendant collected said draft of the plaintiff, through the clearing house in the city of New York in the usual course of business. The check upon

the Federal National Bank, which purported to be signed by E. V. Babcock & Co., was a forgery. "Carroll Bros." is a partnership, composed of two members, doing business in Pennsylvania, and it had dealings from time to time, with said E. V. Babcock & Co., but in the dealings with said E. V. Babcock & Co., Carroll Bros. were always indebted to E. V. Babcock & Co. The indorsement of the name "Carroll Bros." upon said draft was without the knowledge or authority of said Carroll Bros., said E. V. Babcock & Co., or of said Federal National Bank. Subsequently E. V. Babcock & Co. acquired knowledge of the transactions relating to said check and draft, and they presented proof of the facts to the Federal National Bank, and the amount of the check, which had theretofore been charged to the account of E. V. Babcock & Co., was recredited to it. The Mellon National Bank refused to make restitution to the Federal National Bank. The Federal National Bank had at all times mentioned an active account with the plaintiff, and the plaintiff charged the amount of said draft so paid by it to the Federal National Bank, and returned the draft as a voucher to it. When the Mellon National Bank refused to make restitution to the Federal National Bank, it forwarded the draft to the plaintiff, and the plaintiff restored to the Federal National Bank the amount it had charged to it by reason of said draft, and thereupon tendered the draft to the defendant, and demanded restitution of the amount paid by the plaintiff to the defendant on said draft, which demand was refused. Said draft was made, executed, and delivered by said Federal National Bank upon the request of said Pennock, who purported to represent E. V. Babcock & Co., and said Federal National Bank handed said draft to said Pennock accordingly. Prior to the time when the Federal National Bank ascertained the true facts about said check and draft, the amount of the draft credited by the Mellon National Bank to said Pennock was withdrawn from the bank, and said Pennock had died insolvent. This action was brought to recover the amount of said draft, and judgment was entered in favor of the plaintiff, from which judgment an appeal was taken to the Appellate Division of the Supreme Court, where the judgment was unanimously affirmed, and from such judgment of affirmance an appeal is taken to this court.

CHASE, J. (after stating the facts as above). The Federal National Bank was a depositor with the plaintiff. The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor. Critten v. Chemical National Bank, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 529. It is provided by the Negotiable Instruments Law that: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the

party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." Laws 1897, p. 727, c. 612, § 42. If it was necessary for Carroll Bros. to indorse the draft before it could be paid by the plaintiff to the account of the Federal National Bank, then it was never so indorsed, because Pennock's act was a forgery, and wholly inoperative. The defendant cannot retain the money paid to it by the plaintiff upon such unindorsed draft, for the very excellent reason that it had no title to the instrument upon which the money was paid. It is further provided by the Negotiable Instruments Law (section 28) as follows: "The instrument is payable to bearer: (1) When it is expressed to be so payable; or (2) when it is payable to a person named therein or bearer; or (3) when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable; or (4) when the name of the payee does not purport to be the name of any person; or (5) when the only or last indorsement is an indorsement in blank."

It is claimed by the defendant that the draft was payable to a fictitious or nonexisting person, and consequently writing the signature of Carroll Bros. on the back of the draft was not in legal effect a forgery, and not necessary to protect the plaintiff in its payment. The defendant also claims that the Federal National Bank was negligent in not discovering that the check of E. V. Babcock & Co. presented to it by Pennock was forged, and that such negligence should prevent the plaintiff from recovering against the defendant in this action. The draft was obtained from the Federal National Bank by fraud. It was a fraud perpetrated by the same person, who, within a short time after perpetrating it, fraudulently obtained the money upon the draft from the Mellon National Bank, but the fraudulent acts, so far as they concerned persons other than Pennock, were wholly unrelated. The Federal National Bank was the only one concerned in the consideration accepted by it in issuing the draft. The question in this action, therefore, is not dependent in any way upon the facts relating to the consideration for the draft, or as to whether the consideration for the draft was real or fictitious, but whether, upon all the facts disclosed, the draft was legally collected from the plaintiff by one other than its payee, or as ordered by it. The transaction between the plaintiff and the defendant had no legal connection with the fraud by which Pennock obtained the draft from the Federal National Bank. We are of the opinion that the alleged negligence on the part of the Federal National Bank is immaterial in this action, because no act of the Mellon National Bank or of the defendant was induced by the acts, representations, or admissions of the Federal National Bank. We also think that the defendant is wrong in its contention that the draft was payable to bearer as defined in the Negotiable Instruments Law. It is only when a person making an instrument knows that he is making it payable to a fictitious or nonexisting person that it can be treated as payable to bearer.

The appellant asserts that a person to whom a draft, made payable to a third person, is issued can, while he remains the owner thereof, divert it from the purpose for which it was intended, and that, for the purpose of such diversion, or of returning the amount of the draft to his account in the bank, he can indorse the payee's name thereon without being liable for the crime of forgery. Assuming that, in cases where the draft has never been delivered to the payee, or the payee has not in some way obtained a vested interest therein, the appellant is right in its claim, the assumed authority to so indorse the payee's name thereon does not arise because the draft is payable in legal effect to bearer, but because of the fact that such an act of the owner is harmless. Such means of recalling a proposed transaction, or of changing the use to be made of a draft, is sustained upon the right that a person has to do as he pleases with his own, and for that reason, until the rights of others in the draft have become vested, the acts of the owner therewith are innocent and colorless. An irregular form of indorsement of commercial paper is frequently observed and approved, when such paper is indorsed only for deposit to the credit of the payee. Actual ownership of commercial paper and use thereof by the owner are essential to sustain irregular indorsements. The bank in issuing the draft in question dealt with Pennock, but with Pennock as the representative of E. V. Babcock & Co., and not with him individually. Pennock did not purport to act individually, or to exercise individual intention. The draft issued was the obligation of the Federal National Bank. It was payable to a real partnership. The conceded transaction, so far as it was expressed in acts or words, including the delivery of the check charging the amount thereof to E. V. Babcock & Co., and the receipt of the draft in return for the check, was not with Pennock individually, and he did not become the owner of the draft with any rights therein as owner. The secret intention of a criminal, contrary to his express intention, and the avowed purpose for which he obtains possession of a draft, does not give the criminal ownership of the draft, or a legal right to change a draft, payable to a real payee, to one payable to bearer. There is no presumption arising from the facts proven that the name "Carroll Bros." was intended as a fictitious or nonexisting payee. Such intention, to be effective, must necessarily arise from knowledge, and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery. There is nothing in this case to estop the plaintiff from controverting the genuineness of the indorsement of the draft in controversy as in Coggill v. American Exchange Bank, 1 N. Y. 113, 49 Am. Dec. 310, where one of the members of a partnership, the makers of a draft, put it into circulation, with the forged indorsement of the payee upon it, or as in Phillips v. Mercantile National Bank, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, where the person who forged the name of the payee was the cashier of the de-

fendant, empowered to bind the bank by his checks. The legal effect of making a note or bill payable to a fictitious person was stated in Rev. St. pt. 2, c. 4, tit. 2, § 5, as follows: "Such notes, made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer."

Prior to the enactment of the Negotiable Instruments Law, the language of which makes it clear that, if an instrument is to be deemed payable to bearer, although in form payable to a named person, the intention to make the instrument payable to a fictitious or nonexisting person must exist with the maker thereof, this court, in Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821, referring to the rule stated in the Revised Statutes, said: "We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." The court further say: "Bedell (the employé who signed the names of the payees) of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals."

Selover in his work on Negotiable Instruments Law (page 70) says: "The doctrine that a check or bill made payable to a fictitious person is payable to bearer, and negotiable without indorsement if the fictitious character of the payee was known to the parties, originated in England, and in each of the cases holding the doctrine the decision was based on the fact that the acceptor knew, at the time of his acceptance, that the instrument was payable to a fictitious person. If the drawer or maker of an instrument did not know that the payee was a fictitious or nonexistent person, and did not intend to make the paper payable to such person, paper payable to the order of such person cannot be treated as payable to bearer, for the intention of the maker or drawer is the test."

Bunker on Negotiable Instruments, in his note to a section of the Negotiable Instruments Law of Michigan (section 11), corresponding to and the same as section 28 of the Negotiable Instruments Law in this state, compares the bills of exchange act of England (section 7) with the statute of Michigan, and says: "The difference between the two statutes is important. The element of knowledge is the distinguishing feature. Under the English statute the paper is payable to

bearer if the payee be a fictitious or nonexisting person. Under the American statute paper payable to a fictitious or nonexisting person is not payable to bearer unless the maker or drawer knew that the payee was a fictitious or nonexisting person. Under the English statute the fact governs; under the American statute the fact coupled with knowledge governs. Thus there has been carried into the two statutes the differences heretofore existing in the authorities."

In Crawford's Annotated Negotiable Instruments Law it is said in a note to section 28, referring to the case of Shipman v. Bank of the State of New York, supra, and quoting from the opinion: "Hence if the maker or drawer supposes the payee to be an actually existing person (as for instance, where he is induced by fraud to draw the instrument to the order of a fictitious person whom he supposes to exist), the instrument will not be payable to bearer, and no person can acquire the title thereto by delivery. And where the instrument is drawn payable at a bank, the bank cannot charge the same to the account of its customer, since the instrument is not in such case payable to bearer, and the indorsement is a forgery."

In Eaton and Gilbert on Commercial Paper it is said: "Under the common law a bill payable to a fictitious person or his order was neither in effect payable to the order of the drawer nor to the bearer, unless it was shown that the circumstance of the payee being a fictitious person was known to the acceptor. To show that the acceptor was aware that the payee was a fictitious person, evidence is admissible of the circumstances under which he accepted other bills payable to fictitious persons. The fictitiousness of the maker's direction to pay does not depend upon identification of the name of the payee with some existing person, but upon the intention underlying the act of the maker in inserting the name. The rule as to an instrument payable to the order of a fictitious or nonexisting person applies only to paper put in circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to the fictitious person."

Daniel on Negotiable Instruments, in a note to a section (section 139), in which he says that lack of knowledge of the maker of the fictitious character of the payee is not a defense against a bona fide holder, refers to a different rule in this state, and, after calling attention to our Revised Statutes, says: "The Court of Appeals, construing this statute, held that such paper cannot be treated as payable to bearer unless it was put in circulation by the maker with knowledge that the name of the payee does not represent a real person." And, further, in a note to the same section, he says: "But in New York by statute the maker is not bound to an indorsee even, unless he, the maker, knew of the fiction at the time of signing." It does not appear that the Federal

National Bank knew Carroll Bros. was a fictitious or nonexisting person, or intended that the instrument should be payable to bearer.

The judgment should be affirmed, with costs.

VI. Delivery [23]

WORTH v. CASE.

(Court of Appeals of New York, 1870. 42 N. Y. 362.)

Action on a promissory note. Judgment for plaintiff. Defendant appeals.

The defendant's testator delivered to the plaintiff, his sister, a sealed envelope on which there was an indorsement in his handwriting and signed by him in the following words:

"Mary C. Worth, this is not to be unsealed while I live, and returned to me any time I may wish it. T. B. Worth."

After the testator's death, the plaintiff opened the envelope and found in it a note in his handwriting, and signed by him, in the following words:

"Addison, January 30th, 1864.

"I promise to pay my sister, Mary C. Worth, on demand, ten thousand dollars, in consideration of services rendered to me.

"T. B. Worth."

FOSTER, J.[24] * * * The transfer of the note from the testator to the plaintiff was not in the nature of a gift *causa mortis;* for independent of its being founded upon *some* consideration, the testator, when he executed it, was not the subject of any physical malady which would be likely to end in his death, or from which he had any apprehension that his death would ensue. Neither was it an absolute gift, *inter vivos,* because there was *some* consideration for it, and because also the delivery of it was a conditional one. It was subject to revocation by the maker at any time during his life; and it was also subject to the further condition, that the plaintiff should not open the envelope in which it was delivered to her until after his death. It was not intended by the maker as a testamentary bequest; for long after its original delivery to the plaintiff, and after he had subsequently had it in his possession, and returned it to her, in the will which he made, he bequeathed to her the use (while she remained single) of $1,000, without any intimation that it was in lieu of the note; and without any reference to it, and without any attempt on his part then, or there-

[23] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 35–37.

[24] The statement of the case is abridged, and part of the opinion is omitted.

after, to reclaim it from her possession. It was, therefore, manifestly his *intent,* that the note should be hers as well as the bequest.

A deed executed and delivered by a grantor, which is to take effect so as to pass the title at his death, is not in any sense a testamentary disposition of the property described in it; nor is a note, executed and delivered, and accepted, in the lifetime of the maker, but made payable at, or after his death, such a disposition of it; but, in both cases, the instrument is absolute, and passes the right to the land in the one case, and to the money in the other, to vest in possession or action at the death of the grantor or maker. And, if the note in question was delivered and accepted, the transaction is no more testamentary than in the cases of the deed and note referred to; and the only difference is, that in those, the delivery passed the right without power of revocation and without condition; while in this, the power of revocation and the condition continued till his death. I think there are but two questions in the case.

The *first* is, whether the delivery, in the manner and with the conditions specified, and under all the circumstances of the case, was such that, if the note was founded upon a sufficient valuable consideration, it would on his death constitute a valid and legal claim against his estate; and if so, then, *second,* was there such a consideration expressed, and proved by parol, as would make the note a valid demand, if the delivery had been absolute and unconditional?

I think the circumstances show that the maker of the note delivered it to her with the intention that it should be hers absolutely, unless he should thereafter apply to her for its redelivery, or unless she should open the envelope during his life. Or, in other words, that he intended to pass the title in it to her, subject to being devested (as she had the possession) by either of those acts; and that, if neither of them were performed, the title to the note should remain in her. It was not delivered to her as an *escrow,* for *such* a delivery must be made to some third person; and, as a general rule, an *escrow* is made to await some affirmative action on the part of the other party, before he is entitled to the absolute delivery of the instrument, and not the affirmative action of the party who delivers it as an *escrow.* The delivery, therefore, was complete, provided there was an acceptance by her.

There is no doubt that a delivery of a deed or note, or other obligation, to one person in favor of, and for the benefit of, another, constitutes a valid and binding delivery as against the party who delivers it, whether the party in whose favor it is delivered is owner of it or not; and for the purpose of protecting his interests, the law holds the party receiving the delivery as his trustee, and makes his acceptance of it the acceptance of the beneficiary. And this, too, whether the person receiving the delivery knows the contents of the instrument or not, and whether he does anything more than merely receive it or not.

And yet, where the person, in whose favor the instrument is executed, will be injured by the acceptance of it, the delivery to such third person does not bind *him,* unless he authorized such acceptance or adopts it by some subsequent act.

The same is the case with an instrument executed and delivered personally to an idiot or lunatic. If beneficial to him, the party executing it is bound by it, and the idiot or lunatic is entitled to its benefits; but if against his interests, he is not bound, although he has received the delivery. In these cases, the delivery is held good, though the grantee or obligee really had nothing to do with the transaction, in order to carry out the intent of the party who executed the instrument, and for the benefit of the party for whose benefit it was delivered, and constitutes an acceptance on his part, when for his interest to do so, and not when otherwise.

Upon what principle is it, then, that a direct delivery of an obligation to the obligee himself, and a reception thereof by him, does not constitute an acceptance, if the contents of the instrument delivered are not at the time known to him?

And why may not a party deliver an instrument, the contents of which are not known to the party receiving it, with the like effect as if it were, without his knowledge, delivered for his benefit to some third person for him?

Or, suppose that on the 30th day of January, 1864, Theron B. Worth had been indebted to the plaintiff in the exact sum of $10,000, and had on that day delivered the note in question precisely as he did, and it had remained in the possession of the plaintiff as it did, till his death, is it possible that the plaintiff could not maintain an action on the *note,* and that she would have been compelled to count on the original indebtedness? To my mind, the delivery and acceptance were more complete than in any of the other cases to which I have alluded. The delivery was to the party to be benefited; and from what appears it is manifest that, when she received it, she considered it to be something which was of value to her. He had told her that he would pay her well for the services performed for him, and had offered to buy her a house and lot in compensation; and when she received it, on the day when he left her to return to his home, she could not doubt that it contained the compensation, or the evidence of it, which he had promised to make to her; and no doubt she gladly accepted it as such, in the full belief that it contained a generous compensation.

As nothing happened subsequently to the delivery which would invalidate the note, the next question is, were the conditions such as to render it therefor void per se?

By the terms of the delivery, it was intended to be valid, if neither of two affirmative acts were afterward done. It is clear that neither of these acts were performed, and in my judgment the delivery and

acceptance were sufficient, and the note, as such, remained valid in the hands of the plaintiff, provided it was executed for a good consideration. * * *

Judgment affirmed.

SMITH v. DOTTERWEICH.

(Court of Appeals of New York, 1911. 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. [N. S.] 892.)

Action by George N. Smith against Rudolph Dotterweich. From a judgment for plaintiff (132 App. Div. 489, 116 N. Y. Supp. 896), defendant appeals. Reversed, and new trial ordered.

See, also, 118 App. Div. 917, 103 N. Y. Supp. 1142.

WERNER, J. On the 28th day of February, 1901, the defendant executed and delivered to the plaintiff a promissory note for $3,740, payable in six months. When this note became due it was renewed by the four notes in suit, which were dated August 28, 1901, and payable in six months from that date. These renewal notes were not paid at maturity, and the plaintiff brought this action upon a complaint in the usual form. Upon the trial the plaintiff introduced evidence to show that the original note was given in payment of premiums upon two life insurance policies issued to the defendant by the John Hancock Life Insurance Company through the plaintiff, as its general agent.

The defendant interposed an answer, denying that the notes were given for value received and that the plaintiff was the lawful holder and owner thereof, and alleging an oral agreement under which neither the notes nor the insurance policies were to become valid and enforceable obligations, unless the plaintiff should secure for the defendant a certain loan of money. The defendant's testimony in support of these allegations was to the effect that in February, 1901, he was visited in Olean by two insurance brokers named Marvin and Larabee, who solicited him to take some life insurance; that he at first replied that he did not want any; that he afterwards called Larabee into his private office in the Dotterweich Brewery and told him that he had an option to buy the stock of the brewing company and wanted to raise $70,000 to pay for it; that, if he could get a loan for that amount on the life insurance and the brewing company's stock as collateral, he would take the insurance; that Larabee assured him that it could be done, and cited instances in which certain department stores in Buffalo had made loans under similar conditions. The defendant further testified that a week later the plaintiff, Larabee, and Marvin called; that after he had been introduced the plaintiff said: "The boys have been talking—Mr. Larabee and Mr. Marvin have been talking—to you about taking out an insurance for a loan," and I said "Yes." He says, "Do you want it?" I said, "I do, providing you can make the loan." "And Mr. Smith said that if I would take out an insurance he could make the loan for

me, and that this company could take at least 50,000 and he knew where he could place the other 20. They even advised me to split up the policy, so that they wouldn't have any trouble making the loan."

The defendant further testified that he met the plaintiff in Olean about 10 days later, at which time the latter produced the policies; that he then told the plaintiff "that under no consideration could I take out a policy of that kind without he could guarantee to make me a loan"; that when the plaintiff handed the original note to the defendant, "I told him there was no use of my signing that note for a policy at the wages I was getting. I was getting $75 a month and I couldn't pay no $100,000 insurance on $75 a month, and he said, 'You sign this note, and I will hold it in my safe until this deal is closed, and, if it is not closed, I return you the note and you return me the policy. I will hold this note in my safe and won't try to sell it.' He was to loan me $70,000 at 5 per cent. for five years or ten, and with the privilege of having it longer. He said 'I can get you the $70,000 loan, and I can get it for you at 5 per cent. for five years or ten, with the privilege of having it longer.' He said, unless I would sign the note to show that everything was in good faith, he couldn't make me the loan on the policy. He said there wouldn't be any effect in the policy; the policy would be null and void if he didn't get me the loan; that they would take the same chance as I."

These are the circumstances in which the defendant says he executed the original note and delivered it to the plaintiff, receiving at the same time two policies issued by the John Hancock Life Insurance Company for $70,000 and $30,000, respectively, together with receipts showing that the premiums for the first year had been paid.

The defendant sought to show what took place in August, 1901, between Marvin and himself regarding the renewal of the original note, but the learned trial court excluded the proffered evidence, upon the ground that Marvin's declarations and admissions could not bind the plaintiff, as there was no proof that Marvin had authority to do anything except to get an unconditional renewal. Then the defendant further testified that the plaintiff never procured the loan for him; that soon after the notes in suit became due, and before this action was commenced, he went to the plaintiff's office in Buffalo, and asked for a return of the notes and tendered back the policies.

When the defendant rested his case the learned trial court granted the plaintiff's motion for the direction of a verdict, and to this ruling the defendant duly excepted. The defendant also asked the court to submit to the jury the question whether the insurance policies were accepted by the defendant and the original note was delivered to the plaintiff, upon condition that the same should be returned in case the plaintiff did not within a year procure a loan of $70,000 for the plaintiff, with the insurance policies and the brewery stock as collateral. This motion was also denied, and the defendant took an exception.

We have quoted or cited only such parts of the evidence as bear directly upon the question whether the learned trial court erred in directing a verdict for the plaintiff. The case is characterized by a number of peculiarities which may, or may not, be influential in determining the ultimate result, but with these we have no present concern. The question now before us is whether the testimony of the defendant, supplemented by such legitimate inferences therefrom as are most favorable to him, is of sufficient weight and probative force to create a question of fact for the jury, and that question obviously depends upon the nature and effect of the oral agreement to which he testified. If that agreement, which for present purposes must be assumed to have been made, created a condition precedent, without the performance of which the notes never became valid obligations in favor of the plaintiff, then there is a question of fact for the arbitrament of a jury. The converse of the proposition is equally simple. If the effect of that agreement was to ingraft upon a valid contract a condition subsequent, the learned trial justice was right in ruling that the issue was one of law for his decision. A careful analysis of the defendant's testimony has convinced us that he is right in the contention that the case should have been sent to the jury. He testified that he told the plaintiff that under no consideration would he take the insurance, unless the plaintiff would guarantee to make him the loan; that the plaintiff told him to sign the note, which would be held in the plaintiff's safe until the deal was closed; that if it was not closed, the note would be returned to the defendant and the policy would be returned to the plaintiff: that the policy would be null and void if the plaintiff did not get the loan for the defendant, and that both of them would be taking the same chance. If these statements mean anything, they plainly import a condition which was to be performed before the transaction, witnessed by the delivery of the note to the plaintiff and the delivery of the policies and receipts to the defendant, was to be regarded as consummated and binding. That condition was the procurement of the loan which, concededly, was never made. Giving to the defendant's story a fair, natural, and unstrained interpretation, we have a case in which there is failure of the precise condition which must determine the existence or nonexistence of any contract between him and the plaintiff. We are not unmindful of the opposing facts and antagonistic inferences which other features of the transaction may suggest. These are not proper subjects for present discussion. We simply emphasize the controlling circumstance that, if the defendant's story is true, there is no binding contract between him and the plaintiff, and the issue of its truth or falsity is for the jury, and not for the court.

There is no subtlety or ambiguity in the law of the subject; but there is difficulty in applying it to some cases in which there may be uncertainty as to the effect of oral testimony upon contracts which are wholly or partly reduced to writing. When the oral testimony goes directly

to the question whether there is a written contract or not, it is always competent; but when the effect of the oral testimony is to establish the existence of a written contract, which it is designed to contradict or change by parol, then the spoken word must yield to the written compact.

There are many decided cases upon this branch of the law both in this state and in other jurisdictions, but we shall refer to only a few, as illustrating the line of cleavage between the case at bar and the case of Jamestown Business College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740, upon which the respondent relies to support his contentions. In Benton v. Martin, 52 N. Y. 570, this court very clearly enunciated the rule which has always obtained in this state: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which delivery is made. And so also, as between the original parties and others having notice, the want of consideration may be shown." Page 574. This quotation sums up the whole of the law applicable to the case at bar in its present state, and outlines comprehensively the rule which has been followed in Bookstaver v. Jayne, 60 N. Y. 146; Grierson v. Mason, 60 N. Y. 394; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Schmittler v. Simon, 114 N. Y. 176, 21 N. E. 162, 11 Am. St. Rep. 621; and other cases, under a variety of circumstances.

The case of Jamestown Business College Ass'n v. Allen, supra, is a salient illustration of the converse of this rule. There the promissory note was rendered effective and complete by an unconditional delivery. The payee agreed to release the maker, and to cancel the note, upon a future contingency which might or might not arise. That was clearly a condition subsequent, which brought the case within the general rule that a contract reduced to writing, and complete in its terms, cannot be varied and contradicted by oral testimony. Eighmie v. Taylor, 98 N. Y. 288; Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; Stowell v. Greenwich Ins. Co., 163 N. Y. 298, 57 N. E. 480; Mead v. Dunlevie, 174 N. Y. 108, 66 N. E. 658. Thus, to state the difference most concretely, the case at bar is one in which the oral testimony tends to show that the writing purporting to be a contract is in fact no contract at all; while in the case of the Jamestown Business College the oral testimony was in direct contradiction of the written contract, as to the existence and validity of which there was no controversy.

We think the court erred in excluding the evidence offered by the

defendant to show what took place between him and Marvin at the time when the original note was renewed by the notes in suit. It needs no argument to demonstrate that, if it was competent for the defendant to show under what conditions he delivered the original note, he must logically be permitted to show that the renewal notes were affected by the same conditions. Quite aside from this, there is enough in the record to make it a question for the jury whether Marvin was or was not the alter ego of the plaintiff in the dealings with the defendant.

As there must be another trial, we have eliminated from this discussion everything that is not germane to the questions which are before us on this appeal. We have not referred to the defendant's counterclaim, which is manifestly inconsistent with his defense, or to the evidence relating to his asserted possession of options for the purchase of the brewery stock. These and various other features of the case may be of importance in determining the verdict of a jury, but they cannot affect our decision.

The judgment should be reversed and a new trial ordered.

Judgment reversed.

ACCEPTANCE OF BILLS OF EXCHANGE

I. Acceptance According to Tenor [1]

PETIT v. BENSON.

(Court of King's Bench, 1697. Comberbach, 452.)

A bill was drawn upon the defendant, who accepts it by indorsement in this manner: "I do accept this bill to be paid, half in money and half in bills." And the question was whether there could be a qualification of an acceptance; for it was alleged, that his writing upon the bill was sufficient to charge him with the whole sum. But 'twas proved by divers merchants, that the custom among them was quite otherwise, and that there might be a qualification of an acceptance, for he that may refuse the bill totally, may accept it in part; but he to whom the bill is due may refuse such acceptance, and protest it so as to charge the first drawer; and tho' there be an acceptance, yet after that he hath the same liberty of charging the first drawer, as he before had.

BOEHM v. GARCIAS.

(Nisi Prius, before Lord Ellenborough, C. J., 1807. 1 Campb. 425, note.)

Action on a bill drawn on Lisbon, "payable in effective and not in vals reals." The defendant was the drawer of the bill; and the question was, whether it had been dishonored for nonacceptance. The drawees offered to accept it, payable in vals denaros, another sort of currency, which was refused. The defendant now proposed to show that vals denaros was sufficient to answer what was meant by effective. But,

Per Lord ELLENBOROUGH. The plaintiff had a right to refuse this acceptance. The drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in denaros might not have satisfied the term "effective," an acceptance to pay in denaros was not a sufficient acceptance of a bill drawn payable in effective. The drawees ought to have accepted generally, and an action being brought against them on the general acceptance, the question would properly have arisen as to the meaning of the term.

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 42–45.

II. Who May Accept[2]

HEENAN v. NASH.

(Supreme Court of Minnesota, 1863. 8 Minn. 407 [Gil. 363], 83 Am. Dec. 790.)

FLANDRAU, J. Action on bill of exchange against acceptor. On the 18th day of September, 1858, the defendant, Patrick Nash, and one William B. McGrorty were partners under the name, firm, and style of "Nash & McGrorty." On that day Patrick Murnane drew the bill in question on the said firm, in favor of William Devine, and to his order, payable in one month from date. William Devine indorsed the bill to the plaintiff, who, on the 25th day of July, 1859, presented the same to Patrick Nash, who accepted it by writing on its face the following words: "Accepted this 25th July, 1859."

The statute of this state, on the subject of acceptances, is as follows: "No person within this territory shall be charged as an acceptor on a bill of exchange, unless his acceptance shall be in writing, signed by himself or his lawful agent." Pub. St. p. 375, § 7.

We will have to consider, in deciding this case, two questions: First, whether the acceptance by Nash was good as a partnership acceptance, and binding on the firm; and, second, whether it was competent for him to accept the bill as an individual, and incur a liability against himself alone. If the acceptance was binding upon the firm, the action is well brought against one of the members. Pub. St. p. 536, § 38, provides, that "any one of the joint associates may also be sued for the obligations of all." If the liability was individual, the acceptor was, of course, the proper defendant.

In the case of Mason v. Rumsey, 1 Camp. 384, it was held that an acceptance by one member of a firm in his own name would bind the firm when the bill was drawn on the firm. The same was again held in Wells v. Masterman, 2 Esp. 731. This doctrine seems to have been adopted in Collyer on Partnership, § 410, and in Byles on Bills, 144, on the authority of these cases, and some others there collected. In the case of Dougal v. Cowles, 5 Day (Conn.) 511, the same is again laid down on the authority of the case of Mason v. Rumsey. There are other cases that hold an acceptance by a member of a firm, in a name other than the firm name, to raise a question of fact, to be left to the jury, whether the name used substantially describes the firm, or whether it so far varies that the acceptor must be taken to have made it on his own account. See Faith v. Richmond, 11 Adol. & E. 339, 39 Eng. Com. Law Rep. 113; Drake v. Elwyn, 1 Caines (N. Y.) 184.

Acceptances could formerly be made by parol, which was the law

[2] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 46.

in Connecticut at the time of the decision cited from 5 Day, and that point is expressly made by the court in deciding the case. The same may be said of the case of Mason v. Rumsey, which was decided before the statute of 1 & 2 Geo. IV, c. 78, § 2, which provided that acceptances, to be valid, must be in writing. Even after this statute the English courts have held that the word "Accepted," written on the bill by one having authority, is sufficient to bind the drawees. The only principle upon which the courts have held that an acceptance by one partner in his own name will bind the firm is the implied authority which each member has to act for the whole, and when the bill is drawn upon the firm, and accepted by one, they hold that he intended to accept it as drawn.

I find one English case, decided in the Court of Exchequer in 1841, which holds a doctrine much more in accordance with our views of the principles which should govern the question. In Kirk v. Blurton, 9 Mees. & W. 283, the defendants were partners under the name of "John Blurton." One of the firm drew a bill in the name of "John Blurton & Co." The firm was sued upon it, and the partner who did not draw the bill defended. Faith v. Richmond, Mason v. Rumsey, and other cases, were cited. Alderson, B., in delivering the opinion, says: "The court do not entertain any doubt as to the principles of law applicable to this case. One partner can bind his copartner only to the extent of the authority which is given to partners generally, to enable them to carry on the partnership business," which authority he says, in another part of the opinion, is "to bind the firm in the name of the partnership, and in that only."

Since the passage of our statute on the subject of acceptances, no inferences can be indulged in. To make an acceptance valid, it must be in writing, signed by the acceptor or his lawful agent. Mr. Nash, as a partner of the firm of Nash & McGrorty, had a right to accept the bill for the firm by virtue of his general powers as a partner, but this power of a partner is to bind the firm by the use of the firm name, and in no other way. This he did not do, and we are clear that the acceptance cannot be held to bind the firm.

We are next to consider whether the defendant can be held as acceptor individually. It is a well-settled rule of commercial law that no one can accept a bill but the person upon whom it is drawn, except for honor. Polhill v. Walter, 3 Barn. & Adol. 114; Davis v. Clark, 1 Car. & K. 177; May v. Kelly, 27 Ala. 497. If a bill is drawn upon A., and B. accepts it, the act is merely voluntary, without any consideration, and creates no liability whatever in the law. It is allowed, for the convenience of commerce, that a person other than the drawee may, after presentation, refusal, and protest, accept, for the honor of the drawer, or any of the indorsers, or of all the parties as he may see fit; but this is a well-understood transaction, and is done supra protest, and under certain well-settled forms and ceremonies. There is no pretense that Mr. Nash was such an acceptor of the bill in question.

Where a bill is drawn upon several individuals, an acceptance by any one of them is binding upon him, although the bill may be treated, and should be, as dishonored, if not accepted by all the drawees, because the holder is entitled to the acceptance of them all; but in such case a liability accrues against the party accepting, because he is a drawee, as much as if the bill had been drawn upon him alone. Where, however, the bill is drawn upon a firm, any member of the partnership, in his individual capacity, is quite as much a stranger to the same as a third person. He is only connected with the bill through his membership of the firm, which is drawee, and in virtue of such membership he has power to use the firm name in accepting it. If he accepts it in his individual name he does not bind the firm, and there is no consideration for his act. It is the case of a bill drawn on one party and accepted by another.

The court, in deciding the case below, after stating that, "if one of several parties to whom a bill is addressed accepts the same, such acceptance will bind him," adds, in another part of the opinion: "It can hardly be said that one of two or more partners, upon whom a bill is drawn, is so far a stranger to the bill that an acceptance will not bind him. If one of several persons, between whom no business relations exist, can bind himself, by accepting a bill drawn on all, it is not perceived why any one of several partners may not do the like." We have endeavored to show the error of this position above. In the case of a bill drawn upon several individuals, "between whom no business relations exist," each is a drawee in his individual capacity, and competent as such to accept; but, in the case of a bill drawn upon a firm, the association, and not the individual members thereof, is the drawee, and an acceptance by one member in his own name is not an acceptance by the drawee. The complaint is demurrable, and the demurrer should have been sustained.

Order overruling demurrer reversed.

III. Implied Acceptance [3]

WESTBERG v. CHICAGO LUMBER & COAL CO.

(Supreme Court of Wisconsin, 1903. 117 Wis. 589, 94 N. W. 572.)

Action upon a [non]negotiable bill of exchange drawn upon the defendant in favor of the plaintiff by the Lien-Neally Lumber Company for $585, alleged to have been accepted by the defendant. The answer was a general denial. The evidence disclosed that the Lien-Neally Lumber Company, sawmill owners, had purchased from the

[3] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 50.

plaintiff certain logs or stumpage amounting to $585; that they had sold product of their mill, including that of these logs, to the defendant, and were in the habit of making orders and drafts upon the latter for money to pay their various bills. About April 21st, upon plaintiff's application for payment, they made out an order upon the defendant substantially as follows: "To Chicago Lumber & Coal Co.: Please pay to John Westberg five hundred eighty-five (585) dollars for logs delivered at Bibon as per contract. [Signed] Lien-Neally Lumber Co."

They had plaintiff write his name on the back of it, and then Mr. Lien mailed that order, in connection with other orders and time-checks aggregating some $2,000, to the defendant, accompanied by a letter the contents of which are not disclosed. The defendant's representative denied any memory of the order or draft in favor of the plaintiff. It was proved, however, that he sent to the Lien-Neally Company the money for the other orders inclosed in the same letter. Plaintiff never heard from the defendant, but made repeated applications to the Lien-Neally Company for payment, and was put off from time to time by promises, until finally they refused to pay, saying he must look to the defendant. At that time the defendant had paid drafts of that company to more than the amount of the indebtedness to it, and refused to pay this. The plaintiff's draft never was returned to him.

On the trial, a special verdict being requested, the court submitted but one question, namely, whether the defendant received this draft on or before April 23d, which was answered in the affirmative, and thereupon the court found that the plaintiff delivered that order for acceptance on or before April 23d; that it was received by the defendant, and was by it destroyed, and that the defendant is indebted to the plaintiff in the amount thereof, with interest; the last conclusion being predicated upon the theory that the retention and destruction of the order constituted an acceptance. From judgment in accordance with that finding the defendant appeals.

DODGE, J. (after stating the facts as above). Rendition of judgment in favor of plaintiff in this case can be justified only on one of two theories—either that in law an implication of acceptance results from the mere physical receipt of a bill of exchange by the drawee, followed by silence, or that all other facts essential to such implication were undisputed, or were supported by inference from undisputed facts so clear and unavoidable that no reasonable mind could draw any other. Appellant had the right to have each controverted question of fact decided by the jury.

Upon the question of law as to when implied or constructive acceptance takes place, the authorities are reasonably clear and approximately unanimous. Upon delivery for acceptance, the drawee is not bound to act at once. He has a right to a reasonable time—usually 24 hours—to ascertain the state of accounts between himself and the drawer,

and until expiration of that time the holder has no right to demand an answer, nor, without categorical answer, to deem the bill either accepted or dishonored; not accepted, because of the right of drawee to consider before he binds himself; not dishonored, because both drawer and drawee have the right that their paper be not discredited during such period of investigation. After the expiration of that reasonable time the holder has a right to know whether the drawee assumes liability to him by accepting, and, if not, he has a right to return of the document, so that he may protest or otherwise proceed to preserve his rights against the drawer. The consensus of authority is, however, that the duty rests on the holder to demand either acceptance or return of the bill, and that mere inaction on the part of the drawee has no effect. After the expiration of this time for investigation, the drawee may, by retention of the bill, accompanied by other circumstances, become bound as an acceptor; not, however, by mere retention.

There seem to be two phases of conduct recognized by the authorities as charging the drawee—one purely contractual, as where the retention is accompanied by such custom, promise, or notification as to warrant the holder, to the knowledge of the drawee, in understanding that the retention declares acceptance; the other, where the conduct of the drawee is substantially tortious, and amounts to a conversion of the bill. This is the phase of conduct which our negotiable instrument statute (section 1680k, c. 356, p. 735, Laws of 1899) has undertaken to define and limit as refusal (not mere neglect) to return the bill, or destruction of it; reiterating the common-law rule that mere retention of the bill is not acceptance. Overman v. Hoboken Bank, 31 N. J. Law, 563; McEowen & Co. v. Scott, 49 Vt. 376; Colo. Nat. Bank v. Boettcher, 5 Colo. 185, 40 Am. Rep. 142; Dickinson v. Marsh, 57 Mo. App. 566; Dunavan v. Flynn, 118 Mass. 537; Holbrook v. Payne, 151 Mass. 383, 24 N. E. 210, 21 Am. St. Rep. 456; Gates v. Eno, 4 Hun (N. Y.) 96; Matteson v. Moulton, 11 Hun (N. Y.) 268, affirmed 79 N. Y. 627; Hall v. Steel, 68 Ill. 231; First Nat. Bank v. McMichael, 106 Pa. 460, 51 Am. Rep. 529; Koch v. Howell, 6 Watts & S. (Pa.) 350; Short v. Blount, 99 N. C. 49, 5 S. E. 190; Boyce v. Edwards, 4 Pet. 111, 7 L. Ed. 799; Bank of the Republic v. Millard, 10 Wall. 152, 19 L. Ed. 897; 1 Daniel, Neg. Inst. §§ 499, 500.

The doctrine of constructive acceptance is based on the general principles of estoppel. If the conduct of the drawee will prejudice the existing rights of the holder, unless it means acceptance, and the drawee has knowledge of such fact, he is estopped to deny the only purpose which could render his conduct innocuous; namely, acceptance of the bill. This underlying principle suggests the reasons for many of the limitations upon the implication of acceptance from conduct; as, for example, that such implication arises only when the bill is presented for acceptance, and that no one but the holder (payee or indorsee) can

make such technical presentment. 2 Randolph, Com. Paper, §§ 568, 572; 1 Daniel, Neg. Inst. §§ 455, 1681, 1682; Neg. Inst. Law Wis. 1899, p. 738, c. 356. Only when the drawee knows that acceptance is expected would he suppose that his conduct can lead to a belief that he does accept. Only when the presentment is by the holder, whose conduct and rights must be affected by acceptance or refusal, is the drawee charged by the strict rules of the law merchant with notice that his conduct may so injuriously affect the person delivering the bill to him.

In the light of these rules of law it is at once apparent that the verdict alone does not present sufficient facts to charge defendant with constructive acceptance. Not only must he have received the bill, as the jury found, but he must knowingly have received it from the payee or his authorized agent, and for acceptance; and even then there must have been something more than mere retention—either destruction or refusal to return to the holder, if within the negotiable instrument statute, or some circumstances, contractual or tortious, to arouse estoppel, if, by reason of nonnegotiability, this instrument is governed only by the common law. We must, therefore, turn to the evidence to ascertain whether all these necessary additional facts were established beyond controversy. True, the court filed so-called findings of fact declaring some of them to exist, but, as appellant claimed that the fact of acceptance should be submitted to the jury, it did not consent that the court might assume to decide either the facts or the inferences therefrom, unless free from controversy.

The only evidence of the manner and purpose of the sending of this draft is that the drawer sent it in the same inclosure with numerous other documents similar in form, with which plaintiff had no connection. The contents of the accompanying letter are not disclosed, but it is reasonably clear that the other orders were not sent for acceptance on behalf of the payees therein, but merely as vouchers between the drawer and drawee; for, evidently, as expected, the latter sent money in response thereto direct to the drawer. The plaintiff's order or draft, having no time of payment expressed, was payable on demand, and did not need to be presented for acceptance, and therefore did not of itself suggest any demand for such action. 1 Randolph, Com. Paper, § 119; 1 Daniel, Neg. Inst. § 454. The witness Lien testified, "I mailed it in behalf of the Lien-Neally Lumber Co." Plaintiff said: "I didn't mail it myself. Lien said he would mail it. I left it to him." And again: "I was expecting money on this draft. Mr. Lien said he would send the money down to me."

This is the substance of all the evidence as to the circumstances under which this paper came to the hands of the defendant. We need not say more than that, instead of conclusively establishing, as the court found, that "the plaintiff delivered the said order for acceptance to the defendant," it quite as much tends to show the contrary, namely,

that the drawer, with consent of plaintiff, sent it as a voucher for money expected to be remitted to that corporation, and by it paid over to plaintiff. There is no particle of evidence to establish existence of any communication or circumstance which could suggest to defendant that plaintiff sent it or authorized its sending, that any acceptance was demanded or expected, or that plaintiff's relations with the drawer would be affected by silence.

If, however, both of these questions could be answered in the affirmative, there would still remain the question of fact whether defendant's conduct was such as to warrant inference or implication of acceptance. There is no direct evidence of anything except long-continued retention of the draft, and no evidence that any demand was ever made, either for decision as to acceptance or for return. The court sought to meet this question by its finding that defendant destroyed the draft. Of this there is no direct proof, the sole evidence on the subject being that of defendant's agent that he had no recollection about it, and did not know whether or not it was among papers in defendant's Chicago office. Whether this might have warranted the jury in so doing, it certainly was not so wholly inconsistent with any other as to require the court to raise the inference of destruction as matter of law.

Hence we must conclude that there were at least three questions of fact on which the jury were not permitted to decide, as to which the evidence and inferences were not beyond controversy, at least in favor of plaintiff. Whether there was any evidence to support such a decision we need not decide, for there was no motion, after verdict, for judgment in defendant's favor. A new trial must, therefore, be directed.

As a guide to the court and parties upon such new trial it seems important that we declare whether the instrument in suit is within the purview and control of our negotiable instrument law, above cited. Whether such paper continues to be a bill of exchange in pursuance of our earlier decisions (Mehlberg v. Fisher, 24 Wis. 607; Schierl v. Baumel, 75 Wis. 69, 43 N. W. 724), it certainly is not a negotiable bill within the definition of section 1680, Rev. St. 1898, as amended by chapter 356, p. 733, of the Laws of 1899, which requires that such an instrument shall be payable to order or bearer. It seems clear from the title that the codifying law of 1899 is intended to regulate only negotiable instruments. Selover, Neg. Inst. Laws, § 2. It therefore does not affect or control the rights of the parties upon this paper.

Judgment reversed, and cause remanded for a new trial.

IV. Acceptance on Separate Paper [4]

COOLIDGE et al. v. PAYSON et al.

(Supreme Court of the United States, 1817. 2 Wheat. 66, 4 L. Ed. 185.)

MARSHALL, C. J., delivered the opinion of the court.

This suit was instituted by Payson & Co., as indorsers of a bill of exchange, drawn by Cornthwaite & Cary, payable to the order of John Randall, against Coolidge & Co. as the acceptors.

At the trial the holders of the bill, on which the name of John Randall was indorsed, offered, for the purpose of proving the indorsement, an affidavit made by one of the defendants in the cause, in order to obtain a continuance, in which he referred to the bill in terms which, they supposed, implied a knowledge on his part that the plaintiffs were the rightful holders. The defendants objected to the bill's going to the jury without further proof of the indorsement; but the court determined that it should go with the affidavit to the jury, who might be at liberty to infer from thence that the indorsement was made by Randall. To this opinion the counsel for the defendants in the Circuit Court excepted, and this court is divided on the question whether the exception ought to be sustained.

On the trial it appeared that Coolidge & Co. held the proceeds of part of the cargo of the Hiram, claimed by Cornthwaite & Cary, which had been captured and libeled as lawful prize. The cargo had been acquitted in the District and Circuit Courts, but from the sentence of acquittal the captors had appealed to this court. Pending the appeal Cornthwaite & Co. transmitted to Coolidge & Co. a bond of indemnity, executed at Baltimore with scrolls in the place of seals, and drew on them for $2,700. This bill was also payable to the order of Randall, and indorsed by him to Payson & Co. It was presented to Coolidge & Co. and protested for nonacceptance. After its protest Coolidge & Co. wrote to Cornthwaite & Cary a letter, in which, after acknowledging the receipt of a letter from them, with the bond of indemnity, they say: "This bond, conformably to our laws, is not executed as it ought to be; but it may be otherwise in your state. It will therefore be necessary to satisfy us that the scroll is usual and legal with you instead of a seal. We notice no seal to any of the signatures." "We shall write our friend Williams by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. W. feels satisfied on this point, he will inform you, and in that case your draft for $2,000 will be honored."

[4] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 51, 52.

On the same day Coolidge & Co. addressed a letter to Mr. Williams, in which, after referring to him the question respecting the legal obligation of the scroll, they say: "You know the object of the bond, and, of course, see the propriety of our having one not only legal, but signed by sureties of unquestionable responsibility, respecting which, we shall wholly rely on your judgment. You mention the last surety as being responsible. What think you of the others?"

In his answer to this letter, Williams says: "I am assured that the bond transmitted in my last is sufficient for the purpose for which it was given, provided the parties possess the means; and of the last signer, I have no hesitation in expressing my firm belief of his being able to meet the whole amount himself. Of the principals I cannot speak with so much confidence, not being well acquainted with their resources. Under all circumstances, I should not feel inclined to withhold from them any portion of the funds for which the bond was given."

On the day on which this letter was written, Cornthwaite & Cary called on Williams, to inquire whether he had satisfied Coolidge & Co. respecting the bond. Williams stated the substance of the letter he had written, and read to him a part of it. One of the firm of Payson & Co. also called on him to make the same inquiry, to whom he gave the same information, and also read from his letter book the letter he had written.

Two days after this, the bill in the declaration mentioned was drawn by Cornthwaite & Cary, and paid to Payson & Co. in part of the protested bill of $2,700, by whom it was presented to Coolidge & Co., who refused to accept it, on which it was protested, and this action brought by the holders.

On this testimony, the counsel for the defendants insisted that the plaintiffs were not entitled to a verdict; but the court instructed the jury that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, did declare that he was satisfied with the bond referred to in that letter, as well with respect to its execution, as to the sufficiency of the obligors to pay the same, and that the plaintiffs, upon the faith and credit of the said declaration, and also of the letter to Cornthwaite & Cary, and without having seen or known the contents of the letter from Coolidge & Co. to Williams, did receive and take the bill in the declaration mentioned, they were entitled to recover on the present action, and that it was no legal objection to such recovery that the promise to accept the present bill was made to the drawers thereof, previous to the existence of such bill, or that the bill had been taken in part payment of a pre-existing debt, or that the said Williams, in making the declarations aforesaid, did exceed the private instructions given to him by Coolidge & Co., in their letter to him.

To this charge the defendants excepted. A verdict was given for

the plaintiffs, and judgment rendered thereon, which judgment is now before this court on a writ of error.

The letter from Coolidge & Co. to Cornthwaite & Cary contains no reference to their letter to Williams which might suggest the necessity of seeing that letter, or of obtaining information respecting its contents. They refer Cornthwaite & Cary to Williams, not for the instructions they had given him, but for his judgment and decision on the bond of indemnity. Under such circumstances, neither the drawers nor the holders of the bill could be required to know, or could be affected by, the private instructions given to Williams. It was enough for them, after seeing the letter from Coolidge & Co. to Cornthwaite & Cary, to know that Williams was satisfied with the execution of the bond and the sufficiency of the obligors, and had informed Coolidge & Co. that he was so satisfied.

This difficulty being removed, the question of law which arises from the charge given by the court to the jury is this: Does a promise to accept a bill amount to an acceptance to a person who has taken it on the credit of that promise, although the promise was made before the existence of the bill, and although it is drawn in favour of a person who takes it for a pre-existing debt?

In the case of Pillans & Rose v. Van Mierop & Hopkins, 3 Burr. 1663, the credit on which the bill was drawn was given before the promise to accept was made, and the promise was made previous to the existence of the bill. Yet in that case, after two arguments, and much consideration, the Court of King's Bench (all the judges being present and concurring in opinion) considered the promise to accept as an acceptance.

Between this case, and that under the consideration of the court, no essential distinction is perceived. But it is contended that the authority of the case of Pillans & Rose v. Van Mierop & Hopkins is impaired by subsequent decisions.

In the case of Pierson v. Dunlop et al., Cowp. 571, the bill was drawn and presented before the conditional promise was made on which the suit was instituted. Although, in that case, the holder of the bill recovered as on an acceptance, it is supposed that the principles laid down by Lord Mansfield, in delivering his opinion, contradict those laid down in Pillans & Bros. v. Van Mierop & Hopkins. His Lordship observes: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, "He will duly honor it," is no acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement; but if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer."

If the case of Pillans & Rose v. Van Mierop & Hopkins had been understood to lay down the broad principle that a naked promise to accept amounts to an acceptance, the case of Pierson v. Dunlop cer-

tainly narrows that principle so far as to require additional circumstances proving that the person on whom the bill was drawn was bound by his promise, either because he had funds of the drawer in his hands, or because his letter had given credit to the bill, and induced a third person to take it.

It has been argued that those circumstances to which Lord Mansfield alludes must be apparent on the face of the letter. But the court can perceive no reason for this opinion. It is neither warranted by the words of Lord Mansfield, nor by the circumstances of the case in which he used them. "The mere answer of a merchant to the drawer of a bill, saying he will duly honor it, is no acceptance unless accompanied with circumstances," etc. The answer must be "accompanied with circumstances"; but it is not said that the answer must contain those circumstances. In the case of Pierson v. Dunlop, the answer did not contain those circumstances. They were not found in the letter, but were entirely extrinsic. Nor can the court perceive any reason for distinguishing between circumstances which appear in the letter containing the promise, and those which are derived from other sources. The great motive for construing a promise to accept as an acceptance is that it gives credit to the bill, and may induce a third person to take it. If the letter be not shown, its contents, whatever they may be, can give no credit to the bill; and, if it be shown, an absolute promise to accept will give all the credit to the bill which a full confidence that it will be accepted can give it. A conditional promise becomes absolute when the condition is performed.

In the case of Mason v. Hunt, Doug. 296, Lord Mansfield said: "There is no doubt but an agreement to accept may amount to an acceptance; and it may be couched in such words as to put a third person in a better condition than the drawee. If one man, to give credit to another, makes an absolute promise to accept his bill, the drawee, or any other person, may show such promise upon the exchange, to get credit, and a third person, who should advance his money upon it, would have nothing to do with the equitable circumstances which might subsist between the drawer and acceptor."

What is it that "the drawer, or any other person, may show upon the exchange"? It is the promise to accept—the naked promise. The motive to this promise need not, and cannot, be examined. The promise itself, when shown, gives the credit; and the merchant who makes it is bound by it.

The cases cited from Cowper and Douglass are, it is admitted, cases in which the bill is not taken for a pre-existing debt, but is purchased on the credit of the promise to accept. But in the case of Pillans v. Van Mierop the credit was given before the promise was received or the bill drawn; and in all cases the person who receives such a bill in payment of a debt, will be prevented thereby from taking other means to obtain the money due to him. Any ingredient of fraud would, un-

questionably, affect the whole transaction; but the mere circumstance that the bill was taken for a pre-existing debt has not been thought sufficient to do away the effect of a promise to accept.

In the case of Johnson and Another v. Collins, 1 East, 98, Lord Kenyon shows much dissatisfaction with the previous decisions on this subject; but it is not believed that the judgment given in that case would, even in England, change the law as previously established. In the case of Johnson v. Collins, the promise to accept was in a letter to the drawer, and is not stated to have been shown to the indorser. Consequently the bill does not appear to have been taken on the credit of that promise. It was a mere naked promise, unaccompanied with circumstances which might give credit to the bill. The counsel contended that this naked promise amounted to an acceptance; but the court determined otherwise. In giving his opinion, Le Blanc, J., lays down the rule in the words used by Lord Mansfield in the case of Pierson v. Dunlop; and Lord Kenyon said that "this was carrying the doctrine of implied acceptances to the utmost verge of the law, and he doubted whether it did not even go beyond it." In Clarke and Others v. Cock, 4 East, 57, the judges again express their dissatisfaction with the law as established, and their regret that any other act than a written acceptance on the bill had ever been deemed an acceptance. Yet they do not undertake to overrule the decisions which they disapprove. On the contrary, in that case, they unanimously declared a letter to the drawer promising to accept the bill, which was shown to the person who held it, and took it on the credit of that letter to be a virtual acceptance. It is true, in the case of Clarke v. Cock, the bill was made before the promise was given, and the judges, in their opinions, use some expressions which indicate a distinction between bills drawn before and after the date of the promise; but no case has been decided on this distinction, and in Pillans & Rose v. Van Mierop & Hopkins, the letter was written before the bill was drawn.

The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept as an acceptance is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards.

It is of much importance to merchants that this question should be at rest. Upon a review of the cases which are reported, this court is of opinion that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance binding the person who makes the promise. This is such a case. There is, therefore, no error in the judgment of the Circuit Court, and it is affirmed with costs.

Judgment affirmed.

V. Parol Acceptance [5]

JONES v. COUNCIL BLUFFS BRANCH OF STATE BANK OF IOWA.

(Supreme Court of Illinois, 1864. 34 Ill. 313, 85 Am. Dec. 306.)

BECKWITH, J. This is an action of assumpsit to recover the sum of money mentioned in a draft dated July 16, 1861, drawn by Green & Stone on the appellants, alleged to have been verbally accepted by them, but protested for nonacceptance. The defense was that the promise of the appellants to accept did not constitute an acceptance, that such promise was obtained by fraud, and that its consideration had failed. On the trial, the plaintiffs offered in evidence the draft and a written agreement of Green & Stone, dated August 1, 1861, by which they transferred to the appellants all their interest in certain property and claims for commissions, in consideration of the appellants undertaking to pay the draft in question. The plaintiffs also offered evidence tending to prove that the appellants promised Green & Stone that they would accept and pay the draft, and that the appellees, after they had taken it, were informed of this undertaking. A promise by the drawee to pay an existing bill is an acceptance, or, in law, amounts to an acceptance, whether the bill was taken upon the faith of the promise or not. A promise to any person interested in having a bill paid inures to the benefit of the holder. These principles were settled in the time of Lord Ellenborough, and a reference to any of the text-books will furnish the names of a great number of cases in which they have been acted upon in England and in this country. They are too well settled to be discussed at the present day. The court below found there was no fraud in obtaining the promise, and we are entirely satisfied with its finding.

The appellants' agreement to accept the bill was for the benefit of its holders; and the agreement of Green and Jones that the net proceeds of the property and the commissions transferred to the appellants should amount to a certain sum was solely for their benefit. The nonperformance of the latter agreement furnishes no excuse for not accepting and paying the bill. The agreements were not intended to be dependent on each other. The undertaking on the part of the appellants was that they would pay the bills when they became due. They were to convert the property transferred to them into money at the best price they could obtain for it, and ascertain the amount of the commissions; and if these sums did not amount to sufficient to pay the bills which they undertook to pay, Green and Jones undertook

[5] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 53.

to pay them the difference. Such was the legal effect of their agreement. We do not deem it necessary to make a critical examination of the special pleas filed by the appellants. All the matters set up in them were admissible in evidence under the general issue, and on the trial were given in evidence under it. The appellants have had all the benefit which they can derive from the facts; and if the demurrer to some of the pleas was improperly sustained, we should not reverse the judgment after the appellants have had the full benefit of their defense under the general issue. Atlantic Ins. Co. v. Wright, 22 Ill. 462.

Perceiving no error in the record, the judgment of the court below will be affirmed.

INDORSEMENT

I. Formal Requisites [1]

HAINES v. DUBOIS.

(Supreme Court of New Jersey, 1863. 30 N. J. Law, 259.)

On rule to show cause, etc. The issue in this case was tried at the Salem circuit, and a verdict rendered for the plaintiff. The defendant seeks to have the verdict set aside, and a new trial granted, because he was not an indorser of the note sued on, and if an indorser he had no sufficient notice of nonpayment.[2]

WHELPLEY, C. J. The only question made upon the argument was whether Dubois, who was sued as indorser of a note, was duly notified of its dishonor.

The note was made by John W. Wright, payable to the order of Dubois, to secure a debt which he owed to one Thomas Newell. He agreed to give security for the delay of eight months, the time the note had to run, and took the note so made away with him, and brought it back with the name of Dubois written under that of Wright, the maker. It did not appear upon the trial that Dubois refused to indorse the note, but was willing to be a joint maker. No evidence was given to show why he did not indorse his name, as usual, on the back, instead of writing it, as he did, on the face. Dubois was sworn upon the trial, and did not pretend that he did not intend to indorse the note. He knew that the note was payable to his order, and could not be negotiated without his indorsement, and with this knowledge put his name upon it. It was a sufficient indorsement.

If the payee write his name on any part of the note with the intention of indorsing it, it is a sufficient indorsement. An indorsement, as the word imports, is usually put upon the back of a note; that is the regular mode, but the place where written is by no means essential. Partridge v. Davis, 20 Vt. 499–503.

In Rex v. Biggs, 3 P. Wms. 419–428, it was held, under a statute making it a felony to alter or erase an indorsement on a bill or bank note, that a defendant, who had erased with lemon juice a receipt for part payment written on the face of a bank note, was properly convicted under the act for erasing an indorsement.

This is much like the question of how the indorser's name must be

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 56, 57.

[2] The opinions of Ogden and Van Dyke, JJ., are omitted.

written. It has been held that a writing in pencil is sufficient; so an indorsement by initials, and even by figures has been held good. Brown v. Butchers' Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755, and cases there cited; Merchants' Bank v. Spicer, 6 Wend. (N. Y.) 445. The true rule is stated by Nelson, C. J., in the case cited from 6 Hill, 443, that a person may become bound by any mark or designation he thinks proper to adopt, provided he uses it as a substitute for his name, and he intends to bind himself. For the same reason, the place where the name, or mark, or designation is put is not material, if the signer intended it as an indorsement.

The notary, misled by the place in which he found Dubois' signature, sent notice to him as the maker of the note. This notice Dubois, on the trial, admitted he had received, and did not deny that he was fully apprised by it that the note was duly presented for payment at the Salem Bank, where it was payable, payment demanded of the maker, and refused. A short time before the note became due he called upon the plaintiff, to whom Newell transferred it when made, asked to see it, saw it, and remarked that it was correct.

He was not indorser upon any other note at the time with which this might have been confounded. In short, the case leaves no room for doubt that he was fully apprised by the notice of the dishonor of the note, and by fair implication, that he was looked to for payment. The notice in fact answered all the purposes for which a notice is required to be sent to an indorser. This was held sufficient in Howland v. Adrain (decided at June term, 1862) 30 N. J. Law, 41.

No exception was taken in the defendant's brief to the place where the notice was sent.

The verdict was right upon the evidence, and there should be judgment for the plaintiff.

SEARS v. LANTZ & BATES et al.

(Supreme Court of Iowa, 1878. 47 Iowa, 658.)

Action against the defendants Lantz & Bates as makers, and John Bowman as indorser, of a negotiable promissory note. A demurrer having been sustained to so much of the petition as sought to charge Bowman as indorser, the plaintiff appeals.

SEEVERS, J. The note was payable to the defendant Bowman or order, and he wrote on the back thereof the following: "December 18, 1876. I hereby assign all my right and title to Louis Meckley. John Bowman." The ground of demurrer was in substance that no cause of action existed against the defendant, Bowman, under and by virtue of the said writing. Without doubt it amounts to an assignment of all the defendant's right and title in the note. Does this subject him to the liabilities of an indorser? is the question for determination. An indorsement differs from an assignment, in that an indorsee may

bring the action in his own name, and an assignee cannot. 2 Parsons on Notes and Bills, 1.

It was held in McCarty v. Clark, 10 Iowa, 588, that the assignment of a promissory note as collateral security for the payment of another debt passed the title to the indorsee, and that he could sue in his own name without averring or showing that the indebtedness secured by the note had been paid.

In Childs v. Davidson, 38 Ill. 438, it was held that "I guarantee the payment of the within note" amounted to an assignment, and transferred the legal title to the note so as to enable the holder to maintain an action against the maker. See, also, Rowe v. Haines, 15 Ind. 445, 77 Am. Dec. 101.

In Sands v. Wood, 1 Iowa, 263, it was held the words "I assign the within note to Miss Sarah Coffin" amounted to an indorsement, and the party so transferring the note became liable as an indorser.

The effect of the assignment in Sands v. Wood was to assign and transfer whatever title the assignor had in the note. He used no words that in and of themselves indicated that he bound or made himself liable in case the maker after demand failed to pay the note. But it was held the law as a legal conclusion attached to the words used the liability that follows the indorsement of a promissory note.

It will be difficult, we apprehend, to draw a distinction between that case and the one at bar. Here the defendant assigned all his right and title in the note, and this in legal contemplation was the effect of the assignment in Sands v. Wood.

In neither case was there any limit attached to the liability of the assignor. That resulted as a legal conclusion. It must be regarded as settled in this state that the assignment of a promissory note by the payee thereof, in writing on the note, vests the legal title therein in the assignee, so as to enable him to bring an action in his own name against the maker. Such being true, an assignment amounts to an indorsement, and makes the assignor liable as an indorser, within the rule laid down by Parsons, above cited.

The result is the demurrer should have been overruled.

Reversed.

THORP v. MINDEMANN.

(Supreme Court of Wisconsin, 1904. 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.)

This case is reported on page 36, supra.

CENTRAL TRUST CO. v. FIRST NAT. BANK.

(Supreme Court of the United States, 1879. 101 U. S. 68, 25 L. Ed. 876.)

STRONG, J. This case, as made by the bill, answers, replications, and proofs, is as follows: On the 24th day of September, 1874, the First National Bank of Wyandotte, Kan., made its promissory note at Chicago, Ill., in these words:

"$5,000. Chicago, Illinois, Sept. 24, 1874.

"Four months after date we promise to pay to Cook County National Bank, of Chicago, or order, five thousand dollars, with interest at the rate of ——— per cent. per annum after due, value received, all payable at Cook County National Bank. B. Judd,

"Cashier 1st Nat'l Bank, Wyandotte, Kas.

"$6,000 Wyandotte Co. and City bonds as collateral."

The note was made and delivered to the Cook County Bank, in pursuance of an arrangement between that bank and Judd, the cashier of the Wyandotte Bank, by which it was agreed the latter should execute a four months note for $5,000, with security, and have the same discounted by the Cook County Bank, and the proceeds placed to the credit of the Wyandotte Bank, but not to be drawn against so as to reduce the credit for such proceeds below $4,000—such note to remain with the Cook County Bank, and to be surrendered to the maker on the renewal or close of the account. It was distinctly understood between the officers of the two banks when the note was given that it should be held by the Cook County Bank as a memorandum, and not be negotiated or separated from the Wyandotte city and county bonds for $6,000 accompanying it, which were delivered contemporaneously with it as collaterals. Accordingly, the sum of $4,000, part of the proceeds of the discount, was suffered to remain on deposit to the credit of the Wyandotte Bank until the Cook County Bank failed, became insolvent, and passed into the hands of a receiver. At the time of such failure and the appointment of a receiver there was also an additional credit of $868 due from the Cook County Bank to the Wyandotte Bank. When, therefore, the note matured there was due from the payee to the maker of the note the sum of $4,868. But before its maturity, to wit, on the 7th day of October, 1874, the Cook County Bank, in violation of its agreement above mentioned, passed the note to the New York State Loan & Trust Company, by which it was discounted, without any knowledge of any defense which the Wyandotte Bank had against it, or any knowledge of the origin of the note and of the agreement between the two banks, other than what the face of the note revealed.

The note was protested when it fell due, and it is now held by the Central Trust Company of New York, the receiver of the New York State Loan & Trust Company, and the collaterals, the municipal bonds, are held still by the Cook County Bank.

This bill has been filed to compel its surrender and the surrender of the Wyandotte city and county bonds on the payment of $132, the difference between $5,000 and $4,868, the sum standing to the credit of the Wyandotte Bank against the payee; the claimant offering to pay that sum.

In view of these facts, fairly deducible from the evidence, it is manifest that, as between the complainant and the Cook County Bank, there is a perfect defense against the note to the extent of $4,868, the sum standing to the credit of the Wyandotte Bank due from the payee. On the payment of $132 the maker of the note has a clear equity to have it surrendered, together with the municipal bonds held as collaterals.

But it is claimed that the trust company, having received the note before its maturity, and having discounted it in the usual course of business without any knowledge of any equities or defense against it, is entitled to hold it free from any defense which the maker could set up against the payee; that is, against the Cook County Bank.

A large portion of the argument before us has been expended upon the questions whether, inasmuch as the note was given by the cashier of the Wyandotte Bank at Chicago, and was made payable at a future day, it was not void under the general banking law. We pass those questions as unnecessary to be considered. If it be conceded that the note was valid at its inception, it is certainly true the maker had a good defense against it while it was in the hands of the payee, and we do not perceive that the manner in which the trust company or its receiver obtained it puts them or either of them in any better position than the payee occupied.

The note was not indorsed to the trust company, and it was not, therefore, taken in the usual course of business by that mode of transfer in which negotiable paper is usually transferred. Had it been indorsed by the Cook County Bank, it may be that the trust company would hold it unaffected by any equities between the maker and the payee. But instead of an indorsement, the president of the Cook County Bank merely guaranteed its payment, and handed it over with this guaranty to the trust company. The note was not even assigned. There was written upon it only the following:

"For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at 10 per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same. B. F. Allen, Pres't."

In no commercial sense is this an indorsement, and probably it was not intended as such. Allen had agreed that the note should not be negotiated, and for this reason perhaps it was not indorsed. That a guaranty is not a negotiation of a bill or note, as understood by the law merchant, is certain. Snevily v. Ekel, 1 Watts & S. (Pa.) 203; Lamourieux v. Hewit, 5 Wend. (N. Y.) 307; Miller v. Gaston, 2 Hill (N. Y.) 188. In this case, the guaranty written on the note was filled

up. It expressed fully the contract between the Cook County Bank and the trust company. Being express, it can raise no implication of any other contract. "Expressum facit cessare tacitum." The contract cannot, therefore, be converted into an indorsement or an assignment. And if it could be treated as an assignment of the note, it would not cut off the defenses of the maker. Such an effect results only from a transfer according to the law merchant; that is, from an indorsement. An assignee stands in the place of his assignor, and takes simply an assignor's rights; but an indorsement creates a new and collateral contract. 2 Parsons, Notes and Bills, 46 et seq., notes.

At best, therefore, the defendants below can claim no more or greater rights than those of the Cook County Bank, and the complainants are entitled to a return of the note and of the collaterals on payment of the sum of $132.

Decree affirmed.

II. Indorsement in Blank and Special Indorsement [a]

PEACOCK v. RHODES.

(Court of King's Bench, 1781. 2 Doug. 633.)

This case is reported on page 1, supra.

BURCH et al. v. DANIEL.

(Supreme Court of Georgia, 1897. 101 Ga. 228, 28 S. E. 622.)

LUMPKIN, P. J. In order to authorize one to institute and maintain in his own name an action upon a promissory note, the legal title to the paper must be in the plaintiff.

This was an action by Daniel upon promissory notes which were originally payable to John A. Fretwell, or order. Upon each of the notes was written the following transfer: "For value received, I hereby sell and transfer the within note to C. S. Pope, without recourse on me. J. A. Fretwell." Without the knowledge or consent of the makers of the notes, the word "order" had been in each of them erased, and the word "bearer" substituted in its stead, before the action was brought, though it does not appear when or by whom these alterations had been made, or that this had occurred before Daniel, the plaintiff, became possessed of the notes. Whatever may be the truth as to this matter, it is certain that the legal title to the notes was not in the plaintiff when he brought his action. Manifestly it was in Pope, as the

[a] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 58–61.

notes had never been indorsed by him to any one. The unauthorized change in the phraseology of the notes, whether innocently or fraudulently made, did not render them negotiable by mere delivery. If Daniel was in fact the equitable owner of the notes, he might have instituted an action thereon, for his use, in the name of the person holding the legal title; but, under the facts as they appear in the record before us, his case falls squarely within the rule announced at the beginning of this opinion. In this connection, see Dalton City Co. v. Johnson, 57 Ga. 398; Benson v. Abbott, Parker & Co., 95 Ga. 69, 22 S. E. 127.

Judgment reversed.

SMITH et al. v. CLARKE.

(Nisi Prius, before Lord Kenyon, C. J., 1794. Peake, 295.)

This action was brought by the plaintiffs as indorsees of a bill of exchange against the acceptor.

The bill was indorsed in blank by the payee, and after several indorsements it came to one Jackson (whose assignees had indemnified the present defendant) under a special indorsement to him or order. Jackson sent it to Muir & Atkinson, and they discounted it with the plaintiffs, but Jackson had not indorsed it. The plaintiffs had struck out all the indorsements except the first.

Law, for the defendant, objected that this special indorsement had restrained the negotiability of the bill, and that the plaintiffs could not recover without an indorsement by Jackson.

Lord KENYON. The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present plaintiffs.

Note.—The plaintiffs afterwards proved a letter from Jackson to Muir & Atkinson, desiring them to discount this and other bills, but Lord Kenyon thought the plaintiffs' case sufficiently made out without this evidence.

RIDER v. TAINTOR.

(Supreme Judicial Court of Massachusetts, Berkshire, 1862. 4 Allen, 356.)

Contract upon the following promissory note: "$107. Six months from date, for value received, I promise to pay Stephen E. Avery or bearer one hundred and seven dollars with use. Lee, December 1, 1860. Albert J. Taintor." The note bore the following indorsement: "Pay E. A. Bliss, cashier, or order. Warren Newton, Cashier."

At the trial in the superior court, it appeared that the plaintiff had purchased the note in suit before it became due for a full consideration, but the bill of exceptions stated that "there was no evidence that

E. A. Bliss, to whom said note had been indorsed, had transferred or indorsed said note to the plaintiff," or "that the plaintiff had any title in said note from said Bliss, or that said note was sued with the knowledge or assent of said Bliss." Rockwell, J., ruled that the plaintiff was entitled to recover, and the jury returned a verdict accordingly; and the defendant alleged exceptions.

BIGELOW, C. J. The contract of the promisor of the note declared on is to pay the sum due on the note at its maturity to the person who shall then be the bearer. The production of the note by the plaintiff is therefore evidence of his title, and, accompanied as it was in the present case with proof that the plaintiff had become the owner of the note by purchase before it became due, established a conclusive right to recover against the defendant.

The indorsement of a third person, directing the payment of the note to be made to the order of another, did not change the contract of the promisor, or enable him to set up in defense that the plaintiff's title was imperfect, merely because he had not obtained the signature of the person to whom some intermediate holder had ordered the note to be paid. Wilbour v. Turner, 5 Pick. 526; Wayman v. Bend, 1 Camp. 175; Story on Notes, § 132.

Exceptions overruled.

III. Indorsements Without Recourse, Conditional, and Restrictive Indorsements [4]

EPLER v. FUNK.

(Supreme Court of Pennsylvania, 1848. 8 Pa. 468.)

ROGERS, J.[5] This is an action by an indorser against the maker to recover $100, payable to the order of Henry Hamer 12 months after date. It is indorsed to J. M. Funk, without recourse. The defense is, that the consideration of the note was for the right of vending Hoover's patent cornstalk cutting machine, in Dauphin county; that the machine was entirely worthless, and that defendant was induced to enter into the contract by combination, contrivance, and fraud. The plaintiff, after proving the handwriting of the maker and indorser, offered the note in evidence, which was objected to, because, the defendant says, it is not admissible under the statement filed, and in a case like this it is necessary to file a narr., setting out specially the cause of action, the transfer of it, and all the special circumstances. But we are of opinion there is nothing in the objections. The case

[4] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 62–64.

[5] Part of the opinion is omitted.

was clearly embraced by the statement, and the cause of action is set out with convenient certainty. There is nothing in the second bill. An indorser, it is true, is not a competent witness for the indorsee; but where he is released by the indorsee, as here, he is competent, not to impeach, but to enforce payment of, the note. This has been repeatedly ruled. Vide Barnes v. Ball et al., 1 Mass. 73; Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129.

The third bill presents more difficulty. The defendant contends that, under the circumstances exhibited on the face of the note, on the special indorsement and the facts given in evidence, he is entitled to make the same defense against the indorser as between the original parties to the note. The note is indorsed by the payee to the order of J. M. Funk, the plaintiff, "without recourse." This, it is said, is not in the usual course of business; that it was sufficient to put the indorser on his guard, and to lead him to suspect there was something wrong in the transaction, as between the maker and payee. But although most usually notes go forth indorsed in blank, yet I cannot agree that such an indorsement affects the negotiable quality of the paper. It shows only an unwillingness to be answerable for the solvency of the maker —a prudent precaution, particularly where, as here, the note has a long time to run before it matures. And this is the view taken of this fact in Rice v. Stearns, 3 Mass. 225, 3 Am. Dec. 129. In that case a promissory note was indorsed specially thus: "For value received, I order the contents of the note to be paid to A. B., at his own risk." Two points were ruled: (1) That in an action on such a note, by the indorser against the maker, the promisee is a witness to prove the execution of the note. (2) Which, I take it, is the case here, such special indorsement transfers the property of the note, with its negotiable quality, to the indorser.

There seems to be no question that there was a consideration passing between the present holder and the payee. * * *

Judgment affirmed.

ROBERTSON v. KENSINGTON et al.

(Court of Common Pleas, 1811. 4 Taunt. 30.)

This was an action of assumpsit, and the first count in the declaration was on a bill of exchange, of which the following is a copy, viz.

"Edinburgh, 18th Nov., 1808.

"£180. sterling. At 45 days after date, pay this first of exchange, to the order of Mr. Robert Robertson, £180. sterling, value received, which place to account, as advised. W. Forbes, J. Hunter & Co.

"To Messrs. Kensington, Styan & Adams, Bankers, London.

"Accepted, Kensington & Co. Entered, P. J. Raeburn."

Indorsed: "Edinburgh, 19 Nov. 1808. Pay the within sum to Messrs. Clerk & Ross, or order, upon my name appearing in the Ga-

zette as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date. R. Robertson." "Clerk & Ross." "J. Tindale." "Thomas Eyre & Sons." "Thomas Nelson." "Dudding & Nelson." "Bank of England."

The plaintiff declared as payee, against the defendants as acceptors. The declaration also contained counts for money had and received by the defendants to the use of the plaintiff, for money paid by the plaintiff to the use of the defendants, on an account stated, and for interest.

The plea was the general issue. At the trial of this cause before Mansfield, C. J., and a special jury, at the sittings after Hilary term, 1811, at Guildhall, a verdict was entered by consent for the plaintiff for the sum of £180., subject to the opinion of the court on the following case:

The bill, which was for £180., was drawn at Edinburgh on the 18th November, 1808, by Sir Wm. Forbes, J. Hunter & Co., upon the defendants, who are bankers in London, payable to the order of the plaintiff, at 45 days date, for value received. The indorsements by the plaintiff, and by Clerk & Ross, as above set forth, were made before the bill was presented to the defendants for acceptance. The bill was delivered to Clerk & Ross, army agents in Edinburgh, being persons then employed by the plaintiff to procure for him by purchase the commission of ensign above referred to. The bill, with those indorsements upon it, was afterwards presented to the defendants for acceptance, and accepted by them in the usual course of their business as bankers. It was afterwards indorsed and negotiated by the other persons whose names appear as indorsers, and finally with the Bank of England, who discounted it. At the expiration of the 45 days specified in the bill as originally drawn, and the days of grace, the defendants paid the contents to the Bank of England, who presented it to them for payment. The plaintiff, at the time of drawing the bill, paid the full value for the same to Sir Wm. Forbes, J. Hunter & Co., the drawers, but did not ask, or obtain, their consent, or that of the defendants, the acceptors, to make any alteration in the tenor of the bill by indorsement either as to the condition of the payment, or the extension of time. The plaintiff's name had never appeared in the Gazette as ensign in any regiment of the line.

The question for the opinion of the court was whether the plaintiff was entitled to recover. If he was, the verdict was to stand; if he was not entitled to recover, a verdict was to be entered for the defendants.

This case was argued by Lens, Serjt., for the plaintiff, who contended that it was competent for the plaintiff by this special indorsement to make only a conditional transfer of the absolute interest in the bill, which he had purchased for a full consideration, and had vested in him by the delivery of the drawer. The defendants, by subsequently accepting the bill, had become parties to that conditional transfer, and

as the condition had never been performed, the transfer was defeated, and they became liable, after the expiration of the two months, to pay the plaintiff, to whom the property then reverted, the contents of the bill, of which none of the indorsers could enforce payment against the defendants at the 45 days' end, because they had all received the bill subject to the condition, and were bound thereby. He cited Ancher v. Bank of England, Doug. 638.

Shepherd, Serjt., for the defendant, contended that it was immaterial whether the acceptance was before or after the conditional indorsement. The acceptance admitted the handwriting of the drawer, but it did not mix itself with the conduct of the indorsers. It admitted nothing which was on the back of the bill. The whole practice of the courts was accordingly; for in an action against the acceptor it became unnecessary to prove the handwriting of the drawer, but it was necessary to prove the handwriting of the indorser.

THE COURT gave judgment for the plaintiff.

BLAINE, GOULD & SHORT v. BOURNE & CO.

(Supreme Court of Rhode Island, 1875. 11 R. I. 119, 23 Am. Rep. 429.)

Assumpsit on a bill of exchange, heard by the court.

POTTER, J. The draft in question was as follows:

"Banking House of Blaine, Gould & Short,

"North East, Pa., August 16, 1873.

"Thirty days after date pay to the order of Frank Thayer seven hundred dollars. Frank Thayer.

"To Messrs. B. G. Chace & Co., Providence, R. I.

"Due September 18."

Thayer was the agent in Pennsylvania to make purchases for Chace & Co., of Providence, and he drew on them for payment.

This draft was indorsed by Thayer in blank, and was discounted by the plaintiffs before acceptance. The plaintiffs indorsed it as follows:

"Pay Jay Cooke & Co., or order, on account of Blaine, Gould & Short, North East, Pa. Alfred A. Short, Cash'r."

By Jay Cooke & Co. it was sent to the defendants in Providence for collection, indorsed as follows:

"Pay to the order of Messrs. Bourne & Co. Jay Cooke & Co."

The draft was paid by Chace & Co. to the defendants about noon of September 18. Jay Cooke & Co. stopped payment about 11 a. m. of that day, and about 1 p. m. of the same day their failure was generally known in Providence.

The draft was never the property of Jay Cooke & Co., and was never credited by them to the plaintiff, but was merely received by them for collection.

Jay Cooke & Co. were owing the defendants, and the defendants credited it in their account with them, and claim that they had a right so to do.

The rights of parties to bills forwarded for collection have been a fruitful source of litigation. Questions of this sort have generally arisen where some party becomes insolvent, and the contention is who shall bear the loss.

When is the last holder of paper sent for collection bound to look beyond the last remitter?

We are referred by defendants' counsel to one case only. Bank of Metropolis v. New England Bank, 1 How. 234, 11 L. Ed. 115. In that case a bank had forwarded for collection paper with a general or unrestricted indorsement to another bank, which, with its own similar indorsement, had sent it to a third bank for collection. The second or intermediate bank failed, and on the day of its failure notified the third bank that the paper was the property of the first bank. In a suit by the first against the third bank to recover the proceeds, the court, while admitting that if it was a case of two banks acting as collecting agents for each other, and where no consideration was paid or money advanced, the paper would remain the property of the sender, holds that in this case the third bank, which held the paper, not having notice by the indorsement or otherwise that the paper was not the property of the second bank, had a right to treat it as theirs, and was not bound to inquire, and that where two banks dealt together in this way for several years, kept an account current, and mutually credited the collections, there was a lien upon the paper so transmitted for the balance without regard to who might be the real owner. The first bank, by indorsing the paper in such a manner as to make it appear prima facie the property of the failing bank, had no particular equity in its favor.

But this came again before the United States Supreme Court in Bank of Metropolis v. New England Bank, 6 How. 212, 12 L. Ed. 409, where the court lays down its propositions more definitely: That if the collecting bank, at the time of the dealings, had notice that the bill was not the property of the intermediate remitting bank, but had been merely sent by them for collection as agent for some other bank, then the collecting bank had no right to retain for any balance due from the intermediate bank which had failed. Even if the collecting bank had no notice, they could not retain as against the real owner, unless credit had been given to the intermediate remitting bank, or what was equivalent, balances suffered to remain to be met by such paper; but if the latter was the case, and they had treated the intermediate bank as the owner, and had no notice, then they might retain.

And there are further explanations of the decision in Wilson v. Smith, 3 How. 763, 769, 11 L. Ed. 820. And see it criticised and restricted in McBride v. Farmers' Bank of Salem, 25 Barb. (N. Y.) 657, 661, which case was affirmed on appeal in McBride v. Farmers' Bank,

26 N. Y. 450. See, also, Reeves et al. v. State Bank, 8 Ohio St. 465; Jones v. Milliken & Son, 41 Pa. 252; Dickerson v. Wason, 54 Barb. 230, also in 47 N. Y. 439, 7 Am. Rep. 455. There are some cases going still further in favor of the original remitting bank, and allowing parol evidence to show the fact. Lawrence v. Stonington Bank, 6 Conn. 521, and cases there cited; Bank of Washington v. Triplett & Neale, 1 Pet. 25, 7 L. Ed. 37; Commercial Bank of Clyde v. Marine Bank, *42 N. Y. 337, also in 1 Abb. Dec. 405.

A general indorsement of bills is prima facie evidence of property in the indorsee, and, even where it is subject to any equity or trust between former parties, may change the legal property as to bona fide holders for value. Collins v. Martin, 1 B. & P. 648. But even where there is a general indorsement of paper sent only for collection, it will still remain the property of the sender as to all persons having notice.

The counsel for the plaintiffs say that the present case would come under the head of what is in some places denominated a "short entry." It would seem that in London it was a custom (Giles et al. v. Perkins et al., 9 East, 12, and counsel arguendo in Ex parte Thompson, 1 Mont. & Mac. 102, 110) for bankers to receive bills for collection and to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected; and this was called a "short entry," or "entering short." And such bills always continued the property of the customer, unless the contrary was to be inferred from some course of dealing. Whereas country bankers in England generally credited to their customers at once all bills considered good, and generally allowed drafts upon the proceeds. And even in the latter cases Lord Ellenborough held such bills did not pass to the assignees in bankruptcy, if there was a balance in favor of the customer over and above the bills. Giles et al. v. Perkins et al., 9 East, 12; Ex parte Harford, 2 Rose, 163. But Lord Eldon held that where they were with the knowledge of the customer entered as cash, and the customer was entitled to draw against them, he could not claim the specific bills. Ex parte Sargeant, 1 Rose, 153; Ex parte Thompson, 1 Mont. & Mac. 102 (A. D. 1828). But even where the custom was to enter short, and it was not done, this would not change the property, unless some act of the customer concurred. Ex parte Sargeant, 1 Rose, 153; Ex parte Pease, 1 Rose, 232; and the Vice Chancellor's opinion in Ex parte Thompson, 1 Mont. & Mac. 102, 112.

But besides the ground that this was equivalent to a short entry, and that the cases decided upon that point apply to it, it is contended that in this case the effect of the restriction in the indorsement was to give to all subsequent holders express notice of the trust, and we think this view of the plaintiff's counsel is correct.

The indorsee is rather an agent of the indorser with power of substitution, and the bill is still in the possession of the indorser by his agent. Ex parte Sargeant, 1 Rose, 153. The very mode of indorse-

ment in this case shows that it is not a case of ordinary indorsement, and that no consideration has been paid for it. Eadie & Laird v. E. India Co., 1 W. Bla. 295, also in 2 Burr. 1216. The bill must be taken by the holder subject to the trust; and, says Judge Story (on Agency, § 211), if he voluntarily consents to or aids in any other appropriation he is responsible; and says Judge Byles (on Bills, *157), he holds the bill or money as trustee for the restraining party, and is liable to the party making the restriction. The words are notice that the restricted indorsee has no property in the bill, that he is a mere trustee, and that he can appoint no subagent except for the purpose of holding the bill or money on the same trust, and if the holder pays it to the intermediate agent he becomes responsible for its misapplication.

In the case of Sigourney v. Lloyd et al., 8 B. & C. 622, also in 3 M. & R. 58, and in Dan. & Ll. 132, 2 Chitty, Jr., on Bills, 1412, 1439, it was contended that an indorsement, "Pay to B. for my use," was a mere direction to B. as to the application of the money; but Lord Tenterden said that if it meant no more the words were useless, as he would be so liable without those words.

In that case the payee indorsed generally to A. A., the plaintiff, indorsed, "Pay B. or order for my use." The defendants discounted it and applied it to the credit of B. B. failed, and it was held that the indorsement was sufficient notice to prevent its transfer for the benefit of any other person; that all subsequent indorsees were trustees for the plaintiff; and that whoever advanced any money on it did it at his peril. And on appeal this judgment was confirmed by the Exchequer Chamber, the court holding that the money to whomsoever paid was in trust for the indorser. Lloyd et al. v. Sigourney, 5 Bing. 525, also in 3 M. & P. 229, and 3 You. & Jer. 220, and Dan. & Ll. 213.

This custom of restricted indorsing is not of late origin, but is spoken of as usual in Snee et al. v. Prescott et al., 1 Atk. 245, 249 (A. D. 1743); the object being, as there stated, to prevent the indorsement being filled up in such a manner as to pass the interest in the bill.

If the defendants in the present suit had paid the cash to Jay Cooke before hearing of the failure, it would have presented a different question. But they had no right to apply the money of the plaintiffs to the payment of a debt due to them (the defendants) from Jay Cooke. This is not such a payment as can protect them against a suit by the plaintiffs, the real owners. Truettel v. Barandon, 2 Chitty, Jr., on Bills, 1002, also in 8 Taunt. 100, and 1 Moore, 543; Thompson v. Giles, 2 Chitty, Jr., on Bills, 1190, also in 2 B. & C. 422, and 3 D. & R. 733; Lloyd's note to Paley, quoted in full in Story on Agency, § 228, note; 1 Bell's Comm. *270, which work is praised by Mr. Warren as being a "mine of commercial law."

Judgment for plaintiffs.

HOOK v. PRATT et al.

(Court of Appeals of New York, 1879. 78 N. Y. 371, 34 Am. Rep. 539.)

Appeal from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury (reported below, 14 Hun, 396).

This action was brought by plaintiff, as trustee of Charles H. Hook, against defendants, as executors of the will of James P. Haskin, deceased, upon a draft signed and indorsed by said testator, of which the following is a copy:

"$5,000. Syracuse, N. Y., September 13, 1872.

"Orrin Welch, Treasurer Morris Run Coal Co.: Pay to the order of myself, one year after date, five thousand dollars, for value received. [Signed] J. P. Haskin."

Indorsed: "Pay to the order of Mrs. Mary Hook, 35 King, for the benefit of her son Charlie. [Signed] J. P. Haskin."

Defendants waived demand upon the drawee and notice of protest. Upon the trial defendants' counsel moved for a nonsuit, in substance, upon the ground that the indorsement was restrictive and did not import a consideration, but imported a gift. The motion was denied and said counsel excepted.

It was then admitted by plaintiff's counsel that Charles H. Hook, the cestui que trust, and the "Charlie" referred to in the indorsement, was a boy some seven or eight years old at the date of the draft; that he was claimed by plaintiff to be the illegitimate son of defendants' testator, which claim was admitted by said Haskin; that plaintiff was at the date of said draft a married woman, living in the city of Rochester with her husband, who is made a party defendant, and was married not long before the draft was drawn. The boy lived with her and was taken care of by her. A motion was again made for a nonsuit, which was denied, and defendants' counsel excepted.[6]

RAPALLO, J. The point mainly relied upon by the appellant is that the draft and indorsement upon which this action is brought do not on their face import a consideration. The draft was drawn by the defendants' testator upon the treasurer of an incorporated company, payable to the drawer's own order, and purported to be for value received. It was indorsed by the drawer by a special indorsement, "Pay to the order of Mrs. Mary Hook, for the benefit of her son Charlie." The appellant claims that this is one of those restrictive indorsements which do not purport to be made for a consideration, and do not entitle the indorsee to maintain an action on the bill, without proving a consideration.

[6] Arguments of counsel and citations of authorities at end of opinion are omitted.

As a general rule an indorsement of a negotiable bill which purports to pass the title to the bill to the indorsee imports a consideration, and the burden of proving want of consideration rests upon the party alleging it. The restrictive indorsements which are held to negative the presumption of a consideration are such as indicate that they are not intended to pass the title, but merely to enable the indorsee to collect for the benefit of the indorser, such as indorsements "for collection," or others showing that the indorser is entitled to the proceeds. These create merely an agency, and negative the presumption of the transfer of the bill to the indorsee for a valuable consideration.

But where the indorsement purports to pass the title to the bill therein from the indorser, and divest him of all beneficial interest, a consideration for such transfer is presumed. All the cases cited by the counsel for the appellant rest upon these principles. The citation from 3 Kent, Com. 92, states the principle to be that when the indorsement is a mere authority to receive the money for the use or according to the directions of the indorser, it is evidence that the indorsee did not give a valuable consideration for it and is not the absolute owner. This accords with the statement of the principle by Wilmot, J., in Edie v. E. India Co., 2 Burr. 1227. So an indorsement, "Pay to S. W. or order for our use" (Sigourney v. Lloyd, 8 B. & C. 622, 3 Y. & J. 220), was held to create a mere agency, and the addition even of the words "value received" to such an indorsement has been held not to vary its effect (Wilson v. Holmes, 5 Mass. 543, 4 Am. Dec. 75). In Edie v. East India Co., 2 Burr. 1221, the examples of restrictive indorsements put by way of illustration are, "Pay to my steward and no other person," or "Pay to my servant for my use." These show that there was no intention to pass the title to the bill; and the same effect has been given to an indorsement, "Pay to P. only." It was held that these words indicated that the indorsee was agent only, and paid no consideration for the bill, as a purchaser would not have accepted such an indorsement. Power v. Finnie, 4 Call (Va.) 411. But an indorsement to one person for the use or benefit of another affords no such indication. The indorser parts with his whole title to the bill, and the presumption is that he does so for a consideration. The only effect of such an indorsement, by way of restriction, is to give notice of the rights of the beneficiary named in the indorsement, and protect him against a misappropriation. When a bill is indorsed, "Pay to A. or order for the use of B.," A. cannot pass the bill off for his own debt, but he can by indorsing it transfer the title, and will hold the proceeds for the benefit of B., and be accountable to him for them. Evans v. Cramlington, Carth. 5, affirmed in the Exchequer Chamber, 2 Vent. 309. In Treuttel v. Barandon, 8 Taunt. 100, cited by the appellant, drafts payable to the drawer's own order were indorsed by him to De Roure & Co. or order "for the account of Treuttel & Wurz." It appeared that De Roure & Co. were the agents of Treuttel & Wurz,

and the latter were held entitled to maintain trover for the drafts against a party to whom De Roure & Co. had pledged them for their own debt. There is nothing in this case to sustain the proposition that a draft thus drawn and indorsed does not import a consideration, or that the indorsee could not maintain an action upon it against the drawer and indorser without proving a consideration. The effect of the special indorsement was simply to give notice of the interest of Treuttel & Wurz, and prevent De Roure & Co. from appropriating the drafts to their own use. Blaine v. Bourne, 11 R. I. 119, 23 Am. Dec. 429, is to the same point.

In the present case the indorsement did not purport to restrain the indorsee from negotiating the draft, for it was "Pay to the order of Mrs. Mary Hook," for the benefit of her son Charlie. She was constituted trustee of her son and held the legal title. 3 Kent, Com. 89. The indorsement gave notice of the trust, so that if she had passed it off for her own debt, or in any other manner indicating that the transfer was in violation of the trust, her transferee would take it subject to the trust, but there was nothing reserved to the drawer and indorser. He retained no interest in it. The presumption is that the draft was drawn and indorsed by him for a consideration received either from the indorsee or the beneficiary. If the youth of the beneficiary should be deemed to afford a presumption that no consideration was paid by him, the presumption would be that it emanated from his mother.

The facts admitted on the trial do not establish that the consideration was illegal. They show that the boy lived with his mother and was taken care of by her. There is nothing illegal in an undertaking by a putative father to support his illegitimate child, or to pay a sum of money in consideration of such support being furnished by another, though it be the mother of the child. If such was the consideration of this obligation, and it was furnished by Mrs. Hook, she was at liberty to take it, payable to herself in her own right, or for the benefit of her child. * * *

Judgment affirmed.

IV. Irregular Indorsements [7]

PHELPS v. VISCHER.

(Court of Appeals of New York, 1872. 50 N. Y. 69, 10 Am. Rep. 433.)

Appeal from order of the General Term of the Supreme Court in the Third Judicial Department, reversing a judgment in favor of defendant entered upon the report of a referee and ordering a new trial.

[7] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 67, 68.

The action was brought upon a promissory note made by Scudder & Redfield, dated May 15, 1867, payable to the order of James E. Brown, and before delivery to Brown indorsed by Solomon Bennet, defendant's testator. Before the note fell due Brown transferred the note to one Hine, and Hine transferred it to plaintiff absolutely, without condition, before due, for value paid at the time in money.

At the time of the transfer to the plaintiff the note had on it the following indorsement of Brown written above Bennet's indorsement:

"For the purpose of making this note negotiable I indorse the same, payable to the order of Solomon Bennet, without recourse to me as indorser. James E. Brown."

The referee found "that, at the time of such transfer to the plaintiff, he knew nothing of any defense to the note"; also, "that said plaintiff had notice, before he purchased the note, that the indorsements made by the said Brown upon the note were made after it passed into the hands of Brown, with Bennet's indorsement upon it," and decided that the plaintiff could not recover.

Judgment was entered, upon the report of the referee, in favor of the defendant. Further facts appear in the opinion.[8]

GROVER, J. The order of the General Term does not state that it was made upon any error of fact. It must, therefore, be assumed by this court that the judgment was reversed and a new trial granted upon legal errors only. An exception was taken by the respondent to the finding by the referee of the fact that the plaintiff had notice, before he purchased the note, that the indorsements made by Brown upon the note were made after it had passed into the hands of Brown with Bennet's indorsement upon it. This exception raises the question in this court whether there was any evidence in support of the finding. The plaintiff, in his testimony, speaking of these indorsements, says: "I can't say when they were put on; it was done—that is, both of these instruments signed by Brown—during the negotiation of the sale of the note to me. Hine brought all the notes to me to sell them to me." The witness has before testified that he purchased several other notes of Hine at the same time he bought this. Other testimony shows that Bennet's indorsement was put upon the note a long time before the purchase by the plaintiff. It follows that when the plaintiff first saw the note it had been indorsed by Bennet and not by Brown. This sustained the material part of the finding. Whether the note had been in Brown's hands was not material; but, if so, that fact might be inferred from the testimony. This brings us to the real question in the case, which is whether the legal conclusion of the referee, from the facts found, that the plaintiff was not entitled to recover against Bennet, was correct. The substance of the facts so found is that

[8] The arguments of counsel are omitted.

Scudder & Redfield made the note in suit payable to the order of James E. Brown, and, after being indorsed by the defendant Bennet, was by them delivered to Brown the payee; that the note, before maturity, was transferred by Brown to one Hine, and by Hine, before due, transferred to the plaintiff absolutely, without condition for a valuable consideration; that at the time of the transfer to the plaintiff he knew nothing of any defense to the note; and that it then had on it, in addition to the indorsement of Bennet, the following indorsement, made by Brown, written above the indorsement of Bennet, viz.: "For the purpose of making this note negotiable I indorse the same, payable to the order of Solomon Bennet, without recourse to me as indorser;" and the following, written below the indorsement of Bennet: "For value received of Isaac N. Hine I hereby guarantee to the said Hine, or bearer, the collection of the within note of the makers, and Bennet, the indorser," signed by Brown; that the plaintiff had notice, before he purchased the note, that the indorsement made by Brown upon the note was made after it had passed into the hands of Brown with Bennet's indorsement upon it. There would, at first view, appear to be an inconsistency between the finding that the plaintiff, at the time of his purchase, knew of no defense to the note, and the one, in substance, that he did, at that time, know that the note, after being made and indorsed by Bennet, was, by the maker, delivered to Brown, who, after that, made his indorsements upon the note, provided the latter finding constituted a defense for Bennet upon the note, as held by the referee. Be this as it may, full effect must be given to this latter finding upon the same principle that a general verdict is controlled by a special finding of fact. From this finding it appears that the plaintiff did know that the note had been indorsed by Bennet before Brown made the special indorsement thereon.

This presents the questions whether Brown, had he retained the note, could have recovered against Bennet as indorser; and if not, whether he could transfer any such right to a purchaser from him. In Herrick v. Carman, 12 Johns. 159, it was held that the payee of a note, made payable to his order, and indorsed by a third person previous to its delivery to the payee, could not recover against such indorser; that the face of the paper showed that the payee occupied the position of first indorser as to the one previously indorsing, and could not, therefore, be permitted to recover against one in the position as to him of second indorser. In Herrick v. Carman, 10 Johns. 224, it was held, upon a like note, that the party who had so indorsed might, in an action against him by an indorser of the payee, show that the plaintiff held the note as agent of the payee, and that this fact would defeat a recovery for the reason that the payee, as to the defendant, stood in the position of first indorser, and could not therefore recover of him. In Tillman v. Wheeler, 17 Johns. 326, the same rule was held and applied in de-

ciding the case. It may be remarked that in each of these cases it appeared that the payees received the notes from the makers for value, pursuant to an agreement by the maker to give notes with an indorser; but it was held that this fact was of no avail to the plaintiffs, unless it was further proved that the person indorsing did so with intent to become surety for the makers to the payees. It is clear that a party having no right of action upon a note himself can transfer none to another knowing all the facts.

In the present case the plaintiff not only himself knew the facts, but the case shows that they were also known to Hine, of whom he purchased the note. In Moore v. Cross, 19 N. Y. 227, 75 Am. Dec. 326, the doctrine of the above cases was approved; and it was further held that in case the payee of a note, indorsed by a third person before delivery to him, averred and proved that it was the intention of the indorser to become surety of the maker to him upon the note, and that he indorsed the same for that purpose, he could maintain an action and recover upon such indorsement. There is no intimation that the action could be maintained in the absence of such proof. In Bacon v. Burnham, 37 N. Y. 614, it was held that where a person indorsed a note, payable to another or order, the legal presumption was, from the face of the paper, that he stands in the position of a subsequent indorser to the payee, and that in the absence of proof, showing him in a different position, the payee could not recover against him, and, further, that, the payee having no right of action, none could be acquired by transfer from him. This is decisive of the present case.

The counsel for the respondent invokes the rule that the right of a purchaser of negotiable paper is not impaired unless he has such knowledge of the equities between the original parties as to make his purchase dishonest. It is obvious that this does not include defenses apparent upon the face of the paper, but such only as are dependent upon the proof of other facts. In the present case the plaintiff knew that Brown had not indorsed the paper without recourse to Bennet, but that the latter had indorsed it, payable to the order of Brown. The plaintiff must be assumed to have known that, in the absence of proof that Bennet indorsed with the intention of becoming security for the makers to Brown, Brown could maintain no action against him upon the indorsement, and, having no such right himself, could not transfer it to another except upon assuming the responsibility of first indorser as to him; that the transfer of the note by Brown otherwise was a fraud upon Bennet. Had the plaintiff purchased the note of Hine without the knowledge that Bennett first indorsed the note, and that Brown's indorsement was made thereafter, the case would have come within the rule insisted upon by counsel. The plaintiff, in the absence of such knowledge, might have supposed that Brown first specially indorsed the note to Bennet, and that he subsequently indorsed, and that

Brown's guaranty was made still later, upon some other arrangement. Under such circumstances the plaintiff would have been a bona fide holder.

The cases cited by counsel, where notes, not negotiable, were indorsed before delivery, have no application. But in these it was proved that the indorsements were made with the intention of becoming security for the makers to the payee. In Dean v. Hall, 17 Wend. 214, where it was held that the indorser could only be made liable when properly charged as such, and not as maker, the additional views found in the opinion are entirely predicated upon the assumed fact that the indorser put his name on the back at the time the note was made, according to a promise to become originally and directly responsible, or was privy to the consideration of the note. Penny v. Innes, 1 Crompton, Neeson & Roscoe, 439, cited by counsel, was a case upon an indorsement of a bill of exchange, and the indorser was held liable upon the ground that the indorsement was equivalent to the drawing of a new bill by the indorser upon the drawee. If this be so the judgment was correct, as the drawer of a bill is liable to the payee unless it is paid by the drawer, and the proper steps are taken to charge him. This case has been criticised. See Gwinnell v. Herbert, 5 A. & E. 436.

But it is unnecessary to determine in this case whether the point was well decided or not, as the reason of the decision has no application to the indorsement of a note payable to the order of the payee. As we have seen already, the law is settled in this state that such an indorser is not liable to the payee upon the face of the paper, and can only be made so by proof, showing that he indorsed with intent of becoming so liable. Bennet could not be made liable as the maker of a new note, but only as indorser. Hall v. Newcomb, 3 Hill, 233; same case in error, 7 Hill, 416, 42 Am. Dec. 82; Brown v. Curtiss, 2 N. Y. 225.

The judge at General Term fell into the error of supposing that the facts set out in the complaint, bringing the case within the principle of Moore v. Cross, were admitted in the answer. The answer explicitly denies that the defendant Bennet indorsed with intent to become liable as surety to the payee.

The order of the General Term must be reversed, and the judgment entered upon the report of the referee affirmed, with costs.

FAR ROCKAWAY BANK v. NORTON.

(Court of Appeals of New York, 1906. 186 N. Y. 484, 79 N. E. 709.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 8, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, C. J. The action is brought on a promissory note made by one Smith to the plaintiff, which the defendant indorsed prior to its delivery to the payee. But two questions are presented on this appeal.

First. It is alleged the referee committed error in excluding evidence offered by the defendant to show that Smith, the maker, had, some time subsequent to the maturity of the note, a sufficient deposit in the plaintiff bank to pay it, which the plaintiff failed to appropriate for that purpose. The case of National Bank of Newburgh v. Smith, 66 N. Y. 271, 23 Am. Rep. 48, is a conclusive authority to the effect that, in the absence of any direction or agreement to that effect, it was optional with the plaintiff whether it would apply the money or not upon the note in suit, and that it was under no positive legal obligation to do so. Therefore there was no error committed in this respect.

Second. The note was given in renewal and to take up an earlier note, also indorsed by the defendant. To establish the fact that the defendant had indorsed the note with the purpose of giving the maker credit with the payee, proof was given tending to show that, default having been made in the payment of the earlier note, notice of protest thereof was given to the defendant. It is urged that the evidence as to the protest of the earlier note was not of a proper character. It is unnecessary to consider this question, for since the enactment of the negotiable instruments law (Laws 1897, p. 719, c. 612) the law obtaining in the case of such indorsement as that made by the defendant has been radically changed. Prior to that time the indorser was presumed to be a second indorser, and not liable to the payee, though it was competent for the payee to prove aliunde that the intention of the indorser was to give the maker credit with the payee. Bacon v. Burnham, 37 N. Y. 614; Coulter v. Richmond, 59 N. Y. 478. Section 114 of the negotiable instruments law prescribes a different rule. It is enacted that "where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules: "(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties." This note was made in December, 1898, and therefore the proof offered by the plaintiff was not necessary to maintain its cause of action, and the error, if error there was, was immaterial.

The judgment appealed from should be affirmed, with costs.

NATURE AND LIABILITIES OF PARTIES

I. Acceptor and Maker [1]

FARMERS' NAT. BANK OF ANNAPOLIS v. VENNER et al. VENNER v. FARMERS' NAT. BANK OF ANNAPOLIS.

(Supreme Judicial Court of Massachusetts, Suffolk, 1906. 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690.)

MORTON, J. These two actions were tried together before a judge of the superior court sitting without a jury. The first is an action of contract by the plaintiff bank, as the holder of a certain promissory note, against the defendants as makers, to recover the balance alleged to be due after the sale and application of the collateral. The note is dated "New York City, May 14, 1892," and is payable on demand after date to the order of the makers at the office of Wilson, Colston & Co., Baltimore, and is indorsed by the defendants. The writ is dated May 13, 1898, the last day before the action would have been barred by the statute of limitations. The plaintiff is a banking association organized under the laws of the United States and having its usual place of business at Annapolis in the state of Maryland. The defendants formerly were copartners doing business in New York City under the name of C. H. Venner & Co. Personal service was made in this state on the defendant Venner, but no service was made on either of the other two defendants. The firm of C. H. Venner & Co. was dissolved July 31, 1892, and the assets became the sole property of the defendant Venner.

The second action is tort for the alleged conversion of $26,000, par value, bonds of the American Waterworks of Omaha, Neb., pledged as collateral to secure the payment of the above note. The note provided, amongst other things, that the holder might sell the collateral or any part thereof on nonperformance of his promise by the maker "in such manner as the holder hereof may deem proper without notice at any stock exchange or at public or private sale at the option of the holder hereof, and with the right on the part of the holder hereof to become purchaser thereof at such sale." It also contained a provision that "in case of depreciation in the market value of the security hereby pledged * * * a payment is to be made on account or additional approved security given upon demand, so that the market value of the security shall always be at least ten (10) per cent. more than the amount unpaid

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 69–71.

on this note. In case of failure to do so this note shall be deemed to be due and payable forthwith * * * and the holder hereof may immediately reimburse himself by a sale of the security in the manner provided for above." The note is signed "C. H. Venner & Co." and the words "Due on demand" immediately precede the signature.

There was evidence tending to show, or from which it could have been found, that the note and bonds were presented to the defendant Venner in person at his office in New York City and a demand for payment was made. There also was evidence that a demand was made upon him for the payment of $5,000 on account, and for additional collateral under circumstances which justified the latter according to the terms of the note. Neither of the demands thus made was complied with. There was no evidence of a presentment or demand at the office of Wilson, Colston & Co. in Baltimore, or that there were funds there to meet the note if it had been presented. The collateral was sold through the firm of A. H. Muller & Son in New York City and was bid in for the bank at a price, except as to one bond, very much less, as there was testimony tending to show, than other bonds of the same issue were sold for before and after the sale in question. This constitutes the conversion complained of. It is conceded, or, at least, is stated in the bill of exceptions as a fact, that A. H. Muller and Son were proper auctioneers, and that the place where the bonds were sold was a proper place to sell them.

The judge found for the plaintiff in the first action in the sum of $24,865.26, and for the defendant in the second action.[2] The cases are here on exceptions by the defendant Venner to the refusal of the judge to give certain rulings requested by him and to the finding that was made.

We see no error in the rulings or refusals to rule, or in the finding that was made.

The defendant Venner contends in the first place that no action can be maintained on the note because no demand was made for its payment at the office of Wilson, Colston & Co., in Baltimore. It is settled in this state both at common law and recently by statute and by the weight of authority in this country, contrary to the law in England, that, where a note or bill of exchange is payable at a particular time and place, no demand or presentment at the place named is necessary in order to entitle the holder to maintain an action upon the note or bill against the maker or acceptor. Ruggles v. Patten, 8 Mass. 480; Carley v. Vance, 17 Mass. 389; Payson v. Whitcomb, 15 Pick. 212; Wright v. Vermont Life Ins. Co., 164 Mass. 302, 41 N. E. 303. Rev. Laws, c. 73, § 87. For a collection of cases see 1 Dan. Neg. Inst. (3d Ed.) 643; 1 Pars. Notes and Bills (1st Ed.) p. 305 et seq.; 4 Am. & Eng. Ency. of Law (2d Ed.) 373. We see no valid distinction between a note payable on time at a particular place and a note payable on de-

[2] That part of the opinion relating to the second action is omitted.

mand at a particular place. No demand is necessary, before suit, where a note is payable generally on demand. And as we have seen no demand is necessary when a note is payable on time at a particular place. It seems to us that the fact that both circumstances are found in the same note cannot operate to change the rule and render a demand necessary when it would not otherwise be required. McKenney v. Whipple, 21 Me. 98; Gammon v. Everett, 25 Me. 66, 43 Am. Dec. 255; Haxtun v. Bishop, 3 Wend. (N. Y.) 13; Montgomery v. Elliott, 6 Ala. 701; Dougherty v. Western Bank, 13 Ga. 287; Bowie v. Duvall, 1 Gill & J. (Md.) 175.

We think, therefore, that the refusal of the judge to rule as requested, that in order to maintain the action the plaintiff was bound to prove a demand at the office of Wilson, Colston & Co. and that a refusal of a demand to pay the note at any other place did not constitute a default in the payment of the note, was correct, and that the judge was right in ruling, as he did, that a sufficient demand was made though not made at the office of Wilson, Colston & Co. in Baltimore. The note is dated and apparently was made in New York. But it was given in renewal of a note previously held by Wilson, Colston & Co. and was to be paid in Baltimore, and, it fairly may be inferred, was delivered to the plaintiff bank at its usual place of business in Annapolis. It must be regarded, therefore, either as a New York or Maryland contract. If it is to be regarded as a Maryland contract then the decisions by the highest court in that state which were put in by the plaintiff bank would seem to show, so far as they bear upon the question, that a demand at the office of Wilson, Colston & Co. was not necessary in order to enable the plaintiff to maintain its action. Bowie v. Duvall, 1 Gill & J. (Md.) 175. No evidence was introduced as to the law of New York and in the absence of such evidence it is to be assumed that the law of that state is the same as the law of this. Hazen v. Mathews, 184 Mass. 388, 68 N. E. 838. * * *

Exceptions overruled.

NATIONAL PARK BANK OF NEW YORK v. NINTH NAT. BANK OF NEW YORK.

SAME v. FOURTH NAT. BANK OF NEW YORK.

(Court of Appeals of New York, 1871. 46 N. Y. 77.)

The first case is an appeal from judgment of the late General Term, of the First judicial district, reversing order of Special Term sustaining a demurrer to complaint, and also judgment entered upon said order.

The last is an appeal from judgment of General Term, New York Common Pleas, affirming judgment of Special Term of that court overruling demurrer to complaint.

The complaint in the first case states, in substance: That on the 25th of March, 1867, the Ridgely National Bank, of Springfield, Illinois, drew its draft, or bill of exchange, on plaintiff, for the sum of fourteen dollars and twenty cents, payable to the order of Ely Shirly, and delivered the same to the payee. That afterward the amount of said draft was fraudulently changed to $6,300, and the name of the payee to E. G. Fanchon, Esq. That the name of Wm. Ridgely, cashier, signed to said draft, was erased, and afterward rewritten by the person making the erasure. That the same was then discounted by the Lexington National Bank, and by it was endorsed to defendant. That afterward, and on or about April 12th, 1867, defendant presented said draft to plaintiff, and said plaintiff paid thereon the sum of $6,300. That plaintiff discovered the forgery May 10th, 1867, and forthwith notified defendant thereof, and demanded repayment of said sum, less fourteen dollars and twenty cents, which was refused. Defendant demurs, "that the complaint does not state facts sufficient to constitute a cause of action."

In the last case the facts are similar, save as to amount and names.

ALLEN, J. The checks paid by the plaintiffs, the drawees, were forgeries throughout, as well the signatures, as the bodies.

The name of the signer, the cashier of the Ridgely Bank, was not the genuine signature of that officer, and was not written by his authority. The fact that a genuine check had been drawn, and signed by the proper party, upon the same piece of paper, does not affect the character of the instrument in its altered and forged condition. The forger, by skillfully obliterating the genuine signature, together with the words and figures indicating the amount payable thereon, effectually destroyed the instrument, and it was incapable of being restored to its original condition, in the form of a check, and made available for any purpose.

It was but a blank form of a draft or bill, and the act of signing the name of the cashier as drawer, with intent to utter and pass the same as genuine, was a crime, and the signature a forgery, whether the check was for the same or a different amount from that for which the original and genuine bill had been drawn.

Whether the forger used the same paper on which the original instrument had been written and signed, and manipulated it to suit his purposes, or made and forged a check on another and different piece of paper, is not material, so long as the signature of the drawer was counterfeit.

The drafts paid by the plaintiff were not merely raised checks, that is, forged and altered by the obliteration and removal of one sum, and the insertion of another, but were forged instruments in every sense.

The drafts signed by the cashier are not in existence in any form as drafts. The genuine signature was wanting, to make the instruments the checks of the nominal drawer, for any amount. The money was

then paid by the plaintiff upon bills drawn upon it, to which the name of its correspondent had been forged.

For more than a century it had been held and decided, without question, that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid.

The doctrine was broached by Lord Raymond in Jenys v. Fawler, 2 Strange, 946, the Chief Justice strongly inclining to the opinion, that even actual proof of forgery of the name of the drawer, would not excuse the defendants against their acceptance. In 1762 the principle was flatly and distinctly decided by the Court of King's Bench, in the leading case of Price v. Neal, 3 Burrows, 1354, which was an action to recover money, paid by the drawee to the holder of a forged bill. Lord Mansfield stopped the counsel for the defendant, saying that it was one of those cases, that never could be made plainer by argument; that it was incumbent on the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted and paid it, but it was not incumbent for the defendant to inquire into it. This case has been followed and the doctrine applied, almost without question or criticism, in an unbroken series of cases, from that time to this, and it has been distinctly approved in very many cases, which have not been within the precise range of the principle decided. See Archer v. Bank of England, 2 Doug. 639; Smith v. Mercer, 6 Taunt. 76; Wilkinson v. Johnson, 3 B. & C. 428; Cook v. Masterman, 7 B. & C. 902; Cooper v. Meyer, 10 B. & C. 468; Saunderson v. Coleman, 4 M. & G. 209; Smith v. Chester, 1 D. & E. R. 655; Bass v. Clive, 4 M. & S. 15; Bank of Commerce v. Union Bank, 3 N. Y. 230; Goddard v. Merchants' Bank, 4 N. Y. 149; Canal Bank v. Bank of Albany, 1 Hill, 287.

Cases have been distinguished from Price v. Neal, and its applicability to a transfer of a forged instrument, between persons not parties to it, has not been extended to forgeries of indorsements or handwriting of parties to negotiable instruments, other than the drawer. But, as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterward paid. Bank of St. Albans v. Farmers' & Mechanics' Bank, 10 Vt. 141, 33 Am. Dec. 188; Levy v. Bank of United States, 4 Dall. 234, 1 L. Ed. 814; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 6 L. Ed. 334; Young v. Adams, 6 Mass. 182; Gloucester Bank v. Bank of Salem, 17 Mass. 41.

A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded.

It has become a rule of right and of action among commercial and

business men, and any interference with it would be mischievous. Judge Ruggles in Goddard v. Merchants' Bank, supra, well says, "It should not be departed from, or frittered away by exceptions resting on slight grounds, and cannot be overruled, without overthrowing valuable, and well settled principles of commercial law." In the first above entitled action, the judgment of the General Term should be reversed, and that of Special Term affirmed, and judgment absolute for the defendant with costs; and in the other, the judgment of the General and Special Term should be reversed, and judgment for the defendant with costs. All concur.

II. Drawer and Indorser [3]

HANNUM v. RICHARDSON.

(Supreme Court of Vermont, 1875. 48 Vt. 508, 21 Am. Rep. 152.)

Assumpsit for false warranty of a promissory note. Plea, the general issue, and trial by jury, December Term, 1874, Barrett, J., presiding. Said note was for $58, dated Aug. 6, 1870, payable to the order of one McIntosh & Co. 30 days after date, signed by one Lincoln, indorsed by the payees to defendant, and by defendant to plaintiff without recourse to the payees or the defendant. Plaintiff gave evidence that he bought said note of defendant on Jan. 26, 1873, and gave valuable consideration therefor, which was not denied; that defendant warranted the note valid, and not subject to defence by the maker; that when defendant indorsed the note without recourse, plaintiff asked him if that would have any effect to vary his agreement as to the validity of the note, and that defendant said it would not, but would only show that he was not liable for the maker's pecuniary responsibility; that relying upon defendant's statement, and supposing it to be true, plaintiff took the note; that plaintiff subsequently ascertained that the note was given for intoxicating liquor sold in this state in violation of law, and consequently void, and that defendant knew it was so given when he negotiated it to plaintiff. Defendant denied the warranty, and insisted that his indorsement disclosed the true contract between him and the plaintiff. Defendant claimed that the legal effect of his indorsement could not be varied by parol evidence; but the court held that the evidence was admissible to show the understanding and intention of the parties as to the operation and effect of the indorsement—that the indorsement was not conclusive of its legal effect in such sense as to exclude evidence aliunde; to which defendant excepted. The court submitted to the jury to find whether defendant warranted the note

[3] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 74–79.

valid. Verdict for plaintiff. Defendant filed a motion in arrest of judgment, which was overruled, and he excepted. He also filed a motion to set aside the verdict as against evidence, which was overruled after hearing, to which he excepted.

PIERPOINT, C. J. It may be observed in the outset, that this action is not brought by the plaintiff as the indorsee of the note referred to against the defendant as the indorser, and the action is not based upon the indorsement, but is brought upon an alleged warranty by the defendant that the note was a valid and binding note, based upon a valid and lawful consideration, when in fact it was given for an illegal consideration, and was at its inception void. On trial the plaintiff introduced evidence in support of his declaration. After the evidence was in the defendant insisted that as it appeared from the note that it was indorsed by the defendant "without recourse," the legal effect of the indorsement could not be varied or controlled by evidence outside of the indorsement itself—that the same was conclusive in that respect; but the court held that such indorsement was not of itself conclusive of its legal effect in such sense as to exclude the evidence aliunde; and submitted the case to the jury in accordance with such ruling, and it is upon this decision and the charge of the court in respect to it, that the only question that has been raised and discussed by the defendant's counsel arises.

What would have been the effect of this objection if the action had been based upon the indorsement, it is not necessary now to inquire. By indorsing the note "without recourse," the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that in respect to such liability, it may perhaps be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time; and in such case, knowledge on the part of the seller is not necessary to his liability. The implied warranty is, in this respect, like an express warranty, the scienter need not be alleged or proved. Edwards, in his work on Bills and Promissory Notes, p. 188, says: "One who transfers a negotiable instrument by delivery or by indorsement, impliedly guarantees that it is genuine, and that he has title to it. The rule is the same, in regard to personal property. The vendor of a chattel always gives an implied warranty of the title. [Herrick v. Whitney] 15 Johns. [N. Y.] 240; [Murray v. Judah] 6 Cow. [N. Y.] 484; [Tuller v. Davis] 4 Duer (N. Y.) 191; [Heermance v. Vernoy] 6 Johns. [N. Y.] 5. Though the indorser transfers the note upon condition that it is to be collected at the risk of the indorsee, he is, nevertheless, responsible if the note proves to be a forgery." Edwards, p. 289.

In this case the note in question was given for intoxicating liquor sold in this state in violation of law, and therefore was void at its inception; in short, it was not a note, it was not what it imported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his fifty dollars. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand.

The plaintiff has declared as upon an express warranty. If he could prove one, very well; if he could not, the implied warranty is just as available to him, the declaration being according to its legal effect.

This view of the case relieves it from all embarrassment growing out of the question as to the admissibility of parol testimony to vary the indorsement, as the effect of the indorsement is really not involved in the case. And the ruling and charge of the court were really more favorable to the defendant than he had the right to ask.

The exceptions to the overruling of the motion in arrest were waived. The exceptions to the refusal to set aside the verdict as against the evidence, this court refuses to hear, the decision of the County Court being conclusive in such cases.

Judgment affirmed.

III. Accommodation Parties [4]

THOMPSON v. CLUBLEY.

(Court of Exchequer, 1836. 1 Mees. & W. 212.)

Assumpsit by the indorsee against the acceptor of a bill of exchange for £200. drawn by one H. R., payable to his own order, and by him indorsed to the plaintiff.

Plea: That the bill of exchange was wholly made by H. R., at the request and for and by way of accommodation of and for the plaintiff, and was accepted by the defendant, at the request of H. R., for and by way of like accommodation of and for the plaintiff, and that at the time of making and accepting the said bill of exchange it was expressly agreed, by and between the said parties, that if the said bill of exchange should happen to be outstanding at the time when it became due, it should be taken up and paid by the plaintiff, and that no claim or demand should at any time be made against the defendant or H. R., upon or in respect of it—concluding with a verification.

Replication: That before and at the time of the commencement of the suit the plaintiff was, and still is, the holder of the said bill of exchange for good and sufficient consideration, in respect of his being the

[4] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 81-83.

holder thereof; without this, that the said bill was either made or accepted by way of accommodation of or for the plaintiff, or that it was agreed by or between the parties, in manner and form as the defendant has above in the same plea in that behalf alleged—concluding to the country.

The case came on for trial at the sittings after Easter term, before Lord Abinger, C. B., when the defendant, in support of his plea, called H. R., who stated that in the spring of 1833 he had occasion to raise money, and having applied to an attorney to assist him, it was arranged between him and the plaintiff that the witness should give him the bill on which the present action was brought, but which should be taken up by the plaintiff, and that witness should receive bills of like value from the plaintiff, for which witness was to provide, and that the defendant had not received any value for his acceptance. It was objected, on the part of the plaintiff, that this evidence was inadmissible, as it went to contradict the written contract of acceptance, which purported to be an absolute engagement to pay the bill; whereas it was proposed to show that the acceptor was not to pay it, but that the plaintiff, who was the indorsee, was to take it up, and not to sue the acceptor, the effect of which was to make an entirely different contract. Foster v. Jolly, 1 C., M. & R. 709, was relied upon as in point, but the objection was overruled. It was then contended that the exchange of bills between the plaintiff and H. R., the drawer and indorser, was sufficient consideration to entitle the plaintiff to sue the acceptor of the present bill. The learned judge, however, said that, in his opinion, this bill had really been taken by the plaintiff on a special contract by him not to sue the defendant, and as that was proved by the evidence, the plea was made out. Whereupon the plaintiff's counsel elected to be nonsuited, the learned judge giving him leave to move to enter a verdict for the amount of the bill, if the court should be of opinion that the plaintiff was entitled to recover.

G. Henderson now moved accordingly, on the grounds taken at the trial.

Sed PER CURIAM. This defense was clearly admissible, inasmuch as it showed that the acceptance was in truth for the accommodation of the plaintiff, and that all the parties put their names to the bill without consideration. With regard to the evidence being inconsistent with the terms of the instrument, we are of opinion that the agreement as to payment was collateral, and not part of the original contract. It was a collateral agreement, that the plaintiff would not enforce the contract upon the bill.

Rule refused.

GROCERS' BANK OF CITY OF NEW YORK v. PENFIELD et al.

(Court of Appeals of New York, 1877. 69 N. Y. 502, 25 Am. Rep. 231.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, reversing a judgment in favor of defendants, entered upon the report of a referee (reported below, 7 Hun, 279).

This action was upon two promissory notes, on which defendants Penfield and Stone were makers, which were made payable to defendant Truax, and by him indorsed and transferred to plaintiff.

The referee found, in substance, that the notes were executed by the makers without any consideration, were accommodation notes, and were received by plaintiff solely as collateral security for a precedent debt, without any agreement to extend the time of payment of the debt, and thereupon held that plaintiff was not a bona fide holder, and directed judgment dismissing the complaint as to said makers.[5]

RAPALLO, J. We think that the order in this case must be affirmed on the ground stated by Brady, J., in his opinion delivered at General Term. Whatever confusion may have existed upon the point, we think that we may now safely say, in the language of Professor Parsons (1 Parsons on Notes and Bills, 296), that it is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it either in payment or as collateral security for an antecedent debt, and the maker will have no defense. See, also, Story on Bills, § 192, note m, and Story on Notes, § 195, and authorities cited. The existing debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intrusted to the payee, or some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to cut off such equity of the maker. Cole v. Saulpaugh, 48 Barb. 104; Bank of Rutland v. Buck, 5 Wend. 66; Lathrop v. Morris, 5 Sandf. 7.

It has been held by high authority that an antecedent debt is sufficient even in the case of a note fraudulently diverted to constitute the holder a bona fide holder for value without any extension of time or surrender of securities or other new consideration. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. But in this state that doctrine does not prevail. Stalker v. McDonald, 6 Hill, 93, 40 Am. Dec. 389. The leading authorities upon the subject are reviewed in the case of Maitland v. Citizens' Bank, 40 Md. 540, 17 Am. Rep. 620. Whatever difference of opinion may have existed, as to the case of a note diverted or fraudulently put in circulation, it must be regarded as settled that

[5] Arguments of counsel omitted.

an indorsee of a negotiable note made for the accommodation of the indorser, but without restriction as to its use, taking the note in good faith as collateral security for an antecedent debt, and without other consideration, is entitled to the position of a holder for value, and not affected by the defense of want of consideration to the maker.

We should not have deemed it necessary to discuss the point so much at length, but for the reason that it does not appear ever to have been previously expressly adjudicated in this court.

The order should be affirmed, and judgment absolute, etc. All concur.

MARLING v. JONES et al.

(Supreme Court of Wisconsin, 1909. 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996.)

Appeal from a judgment dismissing plaintiff's complaint. The action was against Jones as maker of a note, which he had made for the accommodation of Herman. After maturity Herman negotiated the note to the plaintiff, who paid value for it.[6]

TIMLIN, J. * * * Was the action properly dismissed as to Jones? No consideration moving to the accommodation maker is necessary to uphold an accommodation note. The very name of the paper suggests this. The consideration in such case which supports the promise of the accommodation maker is that parted with by the person taking the accommodation note and received by the person accommodated. Nor is it any defense by the maker of an accommodation note that the taker other than the person accommodated, whether indorsee or transferee for value, knew before and when he took the note that the accommodation maker received no consideration. This would be merely showing that such taker, indorsee, or transferee knew that it was an accommodation note. If this were sufficient to defeat the note, there could be no such thing as accommodation paper, except in cases of ignorance of this fact on the part of the taker, indorsee, or transferee, and this would be contrary to common experience, and avoid many of the daily transactions in banking and other branches of business. Section 1675—55, vol. 3, Sanborn's St. Supp. 1906. But the accommodation note in question was transferred by the party accommodated, namely, the payee therein, after it became due.

Does this circumstance permit the accommodation maker to avoid the note on the ground that he received no consideration? If the effect of a transfer, after due, is merely to leave the transferee subject to notice or knowledge of the true circumstances attending the execution of the note in question, and for this reason subject him to defenses, then, as

[6] The statement of facts is abridged from the opinion. Part of the case relating to a mortgage given to secure the note is omitted.

actual knowledge that the note was accommodation paper would be no defense by the accommodation maker as against the transferee for value from the party accommodated, it would seem that it could make no difference in the liability of the accommodation maker upon this ground whether the note was transferred before or after due. Aside from this imputed notice or knowledge, or actual notice or knowledge, it is not true that the taker for value from the party accommodated stands in the shoes of the latter. The difference between them is that one has parted with value for the note and the other has not. In neither case has the maker received a consideration moving to him. So that between the party accommodated and the accommodation maker there is no consideration parted with or received by either, while between the transferee for value and the accommodation maker there is a consideration moving from the former at the instance of the latter sufficient to support the contract. There is considerable conflict among the decisions on this point, and those text-writers who profess to have made a thorough examination of the cases seem to incline to the belief that the weight of authority upholds the view that the transferee of accommodation paper after due may enforce the same against the accommodation maker. Joyce, Defenses to Com. Paper, § 282 (A. D. 1907); 1 Dan. Neg. Inst. (5th Ed.) § 726 (A. D. 1903); 2 Randolph, Com. Paper (2d Ed.) § 677 (A. D. 1899); Story, Prom. Notes (7th Ed.) § 194 (A. D. 1878); 2 Parsons, Notes and Bills, p. 29 (A. D. 1865); Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109, 2 Ann. Cas. 254; Black v. Tarbell, 89 Wis. 390, 61 N. W. 1106; 1 Am. & Eng. Ency. Law (2d Ed.) 364.

The Uniform Negotiable Instrument Law (Sanborn's St. Supp. 1906, §§ 1675 to 1684—7) enacted by the Legislature of this state, and in like manner adopted by 34 states of the Union, and by Congress for the District of Columbia, in the effort to bring about more uniformity of decision regarding these instruments of commerce, appears to distinguish between a holder for value and a holder in due course. Brannan, Neg. Inst. Law (A. D. 1908); Bunker, Neg. Inst. Law (A. D. 1905). Section 1675—55, Sanborn's St. Supp. 1906, defines who is an accommodation party, and provides that such party is liable on an instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. Section 1675, Sanborn's St. Supp. 1906, defines "holder" to mean the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof, and defines "value" to mean a valuable consideration. On the other hand, a holder in due course is defined in section 1676—22, Sanborn's St. Supp. 1906, to be one who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that

at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it; (5) that he took it in the usual course of business.

In the hands of a holder otherwise than in due course such note is subject to the same defenses as if the notes were not negotiable. Section 1676—28, Sanborn's St. Supp. 1906. A negotiable instrument is discharged by the payment in due course by the party accommodated. It is not discharged by payment by a party secondarily liable thereon, but remits such party to his rights against him primarily liable (section 1679—2, Sanborn's St. Supp. 1906), except where it is made for accommodation and paid by the party accommodated (Id.). On the other hand, there are the cases of Chester v. Dorr, 41 N. Y. 279; Peale v. Addicks, 174 Pa. 543, 34 Atl. 201; Bacon v. Harris, 15 R. I. 599, 10 Atl. 647; Battle v. Weems, 44 Ala. 105; and Simons v. Morris, 53 Mich. 155, 18 N. W. 625. See, however, in Alabama the later case of Connerly v. Planters' & M. Ins. Co., 66 Ala. 432; in Michigan the later case of Warder, B. & G. Co. v. Gibbs, 92 Mich. 29, 52 N. W. 73.

No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases where the note is fair on its face and negotiated in due course before due to a purchaser for value, without notice or knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated. But the fact that the accommodation maker received no consideration is not one of these defenses, so long as the note was negotiated by his express or implied authority. The fact is here established that this note was in its inception accommodation paper. Jones made to Herman no express restriction upon its use for that purpose. We do not overlook the testimony of Brand with reference to conversations between him and Herman not in behalf of Jones, which the court below from its findings must have rejected as incredible. We approve this rejection. The testimony is overborne by the circumstantial evidence. It is a question upon which the precedents are at some variance whether or not the agency of the party accommodated to use the accommodation paper to raise money thereon (no express agreement appearing) expires with the maturity of the paper. The greater number of courts seem to favor the view that the agency to negotiate an accommodation paper and raise money thereon is not so limited. See citations supra.

The courts of this state are not yet committed upon the question presented, and it seems more in harmony with the uniform negotiable instrument law, and with the weight of judicial authority, to hold, as we do, that the mere fact that the accommodation note was transferred by the party accommodated after due to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note, and without consideration moving to the accommoda-

tion maker. This necessitates a modification of the judgment of the court below so as to permit the appellant to take judgment against the accommodation maker, Jones. * * *

HARGER et al. v. WORRALL.

(Court of Appeals of New York, 1877. 69 N. Y. 370, 25 Am. Rep. 206.)

RAPALLO, J. This action was brought against the appellant and his copartner as acceptors of a bill of exchange drawn upon them by the Pittston & Elmira Coal Company, and transferred to the plaintiffs. The complaint contains all the necessary allegations to maintain the action, and among them an averment that after acceptance and before maturity, the bill was, for value received, sold, transferred and delivered to the plaintiffs. The answer does not deny any of the allegations of the complaint, but sets up as a defense that the bill was accepted by the defendants without consideration and solely for the accommodation of the coal company, and to enable them to raise money thereon, and that it was discounted by the plaintiffs for that company at a usurious rate of interest. No evidence was given by the defendants in support of this defense, except that the acceptance was without consideration as between the drawers and acceptors and solely for the accommodation of the drawers, and the referee so found. No proof was given by either party as to the amount paid by the plaintiffs for the bill, and the defendants claimed upon the trial and now insist that they having proved themselves to be mere accommodation acceptors, it was incumbent upon the plaintiffs to show what value they paid for the bill, and that their recovery should be restricted to the amount so paid.

Such would undoubtedly be the case had the acceptance been obtained by fraud or duress, or had it been fraudulently diverted from the purpose for which it was given. First Nat. Bank v. Green, 43 N. Y. 298. But, in the absence of proof of fraud or misappropriation, the presumption is that the indorsee of a negotiable bill or note is a bona fide holder for value, and this presumption is not repelled merely by proof that the bill or note as between the immediate parties was without consideration, and was made, indorsed, or accepted by one for the sole accommodation of the other. When no other proof is given the holder is not bound to prove a valuable consideration. Ross v. Bedell, 5 Duer, 462; Mechanics' & Traders' Bank v. Crow, 60 N. Y. 85. The proof and finding that the bill in the present case was accepted without consideration, and solely for the accommodation of the drawer, constituted no defense to the action, and, as no other fact was proved on the part of the defense, the plaintiffs were clearly entitled to judgment. Grant v. Ellicott, 7 Wend. 229.

In the case of Bank of St. Albans v. Gilliland, 23 Wend. 311, 35

Am. Dec. 566, cited by appellant, the note was given for the accommodation of a firm, and applied by one member of the firm to his individual use. This was a clear misappropriation of the note, which threw upon the holder the burden of proving that it paid value. No such diversion appears in the present case. The other references by counsel are to cases where one member of a firm has issued accommodation paper without the consent of his copartners. They are inapplicable here, as the acceptance by the firm is admitted in the pleadings.

The judgment must be affirmed.

TRANSFER

I. Delivery without Indorsement of Instrument Payable to Order [1]

LANCASTER NAT. BANK v. TAYLOR.

(Supreme Judicial Court of Massachusetts, Worcester, 1868. 100 Mass. 18, 1 Am. Rep. 71, 97 Am. Dec. 70.)

Contract on a promissory note for $1,000, signed by the defendant, dated April 16, 1866, payable to Jonathan S. Butterick or order, and indorsed by him to the plaintiffs. Trial in the superior court, before Reed, J., who allowed the following bill of exceptions:

"It was conceded at the trial that the defendant wrote his name upon the paper produced in support of the declaration, and that the plaintiffs received the same on April 16, 1866, in payment of a previous note of like tenor signed by the defendant and indorsed by Butterick, which fell due on that day; and there was evidence that by mistake Butterick did not at the time indorse the note declared on.

"The defendant offered to show that Butterick applied to him to sign a note for $100 as an accommodation for Socrates Henry, and that for that purpose he signed a blank note, which Butterick was authorized to fill up as a note for $100 only, but which he in fact by fraud and without authority filled up as a note for $1,000, and indorsed and got discounted at the plaintiffs' bank for his own benefit, and which was the previous note above named.

"The defendant further offered to show that the signature to the note in suit was obtained by Butterick by a like request for his signature to a note for $100 for Henry's benefit, and that he signed his name in blank, and authorized Butterick to fill up the instrument over his signature as a note for $100 only, but that Butterick fraudulently and without authority filled it up as a note for $1,000; that the defendant never received anything on account of this or the previous note; that Butterick never indorsed the note to the plaintiffs till long after its maturity, and after they had notice of the above facts; and that at the time of the taking up of the first note Butterick was responsible and able to pay the same, and the same could have been collected of him.

"The judge ruled that, if the note was passed and sold to the plaintiffs before maturity, but by mistake was not indorsed, and the bank in consideration therefor relinquished a note for a like amount on which the defendant was legally liable as maker, and the note was afterwards, before action, indorsed by Butterick, the plaintiffs would be

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 90, 90a.

entitled to recover, even if the facts offered by the defendant were true; whereupon the defendant submitted to a verdict, and excepted to the foregoing ruling." [2]

FOSTER, J. The rule that the indorsee of a negotiable promissory note, who has taken it before maturity for value and without notice of any want of consideration or other defect rendering it void in its inception, can enforce it against the maker, notwithstanding it was valueless in the hands of the original payee, is founded upon the custom of merchants and the statute of 3 & 4 Anne, c. 9. It is an exception to the general rule of the common law, according to which a written promise can be enforced only in the name of the party to whom it is made, and, if it has been assigned, although the assignee is allowed to bring an action upon it in the name of his assignor, yet he has no greater rights than the assignor possessed, and the instrument remains subject to every defense that would have existed if no assignment had taken place. The ordinary rule applies to all notes which are not negotiable, and to all negotiable notes which are not duly indorsed for value before maturity. A note not negotiable may be assigned and transferred like any other chose in action, but can be sued only in the name of the payee, and is liable to every defense existing against him. A negotiable note not transferred until it is overdue may be sued in the name of the indorsee, but as to defenses must be treated precisely like one not negotiable. And a negotiable note which is transferred before maturity, but not indorsed until afterwards, in our opinion can stand on no better footing. Whoever receives it takes a contract which upon its face shows that it is subject to every defense that could have been made between the original parties. There is no custom of merchants in favor of such an assignee, and no rule of law by which he is entitled to greater rights than the payee. If the contract was originally invalid for want of consideration or other cause, so will it be in any other hands into which it passes before the legal title is transferred by regular indorsement. No such indorsement having been made before the note is overdue and dishonored, any subsequent one takes effect only from its date. There is no doctrine, known to the mercantile law, by which it can relate back to the time of the equitable transfer, and place the assignee in the same position as if he had been before maturity the holder of the note for value.

It is true a distinction between negotiable and nonnegotiable notes has been recognized in regard to the set-off allowed by statute, and, where a negotiable note was transferred for value before it was dishonored, but not indorsed till afterwards, a previously existing set-off of a distinct demand against the payee was not allowed to prevail. Ranger v. Cary, 1 Metc. 369. The set-off of distinct demands is a matter regulated by statute, and not a common-law defense. And the

[2] Arguments of counsel are omitted.

court carefully limit the application of their opinion, saying that "here is no question of want or failure of consideration of this note, no offer to prove payment of it; but the defendants rely on an account filed in offset." This case is therefore no authority against the conclusion to which we are conducted by applying the elementary principles of the law merchant.

The facts in the present action show that the defendant intrusted to Butterick his signature to a blank note, with authority to write over it a note of $100 for the benefit of one Henry; that Butterick fraudulently filled up the note now in suit so as to make it one for the sum of $1,000 payable to his own order, and passed it to the Lancaster Bank in payment of a former note—that is, for a valuable consideration. But Butterick did not then indorse the note; and it remained in the hands of the bank unindorsed till after its maturity. At a later date, when the note was overdue and the bank had notice of all these facts, Butterick did indorse it. Undeniably, if he had done so originally, the defendant would have been liable. Having placed it in the power of Butterick to perpetrate such a fraud, the injury caused by the defendant's own negligence must have been borne by himself, and not by the bank, which was in no fault and guilty of no want of due care. But the defendant is liable only upon and to the extent of the contract which was written, and not for one which might have been, but was not, made. The bank saw fit to take the note, which purported to be in favor of Butterick, without requiring him to indorse it. They therefore took it subject to any defense which might be made to an action in Butterick's name. And the subsequent indorsement does not improve their position. When the note came into the hands of the bank, payable to the order of Butterick and not indorsed by him, the very form of the instrument gave notice that no one could bring an action upon it except in the name of Butterick, and that it was subject to every defense affecting its original validity which could have been made to it while it continued in his hands.

There is a recent English case in which this identical question has been determined by eminent judges, of great experience and authority in mercantile law. A check or sight draft, obtained by fraud from the defendant by one Griffiths, was transferred for a valuable consideration to the plaintiff, before dishonor and with no notice to him of the fraud. But the actual indorsement of the paper was not made till the instrument was dishonored and the plaintiff had notice of its fraudulent origin. On this state of facts, Erle, C. J., said: "The intention, no doubt, was, that the plaintiff should take the instrument as indorsee; but the indorsement was omitted, and whilst it was in the hands of the plaintiff without being indorsed it was as if it had been an ordinary chattel that had passed by an equitable and not by a legal assignment. All the rights, therefore, that the plaintiff had at that time at law were such as Griffiths had, and no more. Then Griffiths, having defrauded the defendant of the bill, could have no right to it as against the de-

fendant. The law relating to negotiable instruments is that the fact of delivery gives to the person who takes the instrument a title which is good as against all the world, notwithstanding there may be some defect in the title of him from whom the bill is taken, provided it is taken by indorsement for value and without notice of the fraud which constitutes the defect in title. Now the title which the plaintiff gained on the delivery of this instrument was not like that which he would have obtained on the delivery of a negotiable instrument not requiring indorsement; it was yet incomplete, but capable of being perfected by indorsement. Before he had obtained the indorsement he was not within the rule of law I have mentioned; and when he did obtain it he had notice that he could not gain any title to the bill on account of the fraud practiced on the drawer." In the same case, Willes, J., said: "The general rule of law is, 'Nemo dat, qui non habet;' but in the case of negotiable instruments, in order that they may circulate freely, and that persons may not on every occasion be put to the trouble of inquiring into their origin and the transactions between the original parties to the bill, there is an exception to the above rule, and a person taking a bill during its currency, for value, and without notice of any fraud perpetrated by him from whom he takes it, is entitled to sue any person whose name is on the bill, notwithstanding that the person against whom he brings his action was originally defrauded of that bill. It is necessary, however, that the bill should have been indorsed to the holder and taken by him during its currency, and not after it became due; for a person who takes a bill in any manner after it has become due takes it subject to all the equities between the antecedent parties. The person who claims the benefit of this law relating to bills of exchange must prove that he is entitled to do so; he must show that he took the bill by indorsement for value and without notice of fraud. This is a doctrine of the law merchant in favor of those who have acquired by their diligence a complete title. The plaintiff has failed to show that he has done so, and cannot now recover upon it." Whistler v. Forster, 14 C. B. (N. S.) 248.

In the opinion of a majority of the court, these citations express with fullness and accuracy the rule, and the limitations of the rule, of the law merchant, which gives to the bona fide indorsee for value before maturity of a negotiable instrument a better title and a more complete right of action than the original payee of the instrument may have possessed. The learned judge at the trial having proceeded upon a different view of the law, the exceptions are sustained.

II. Right to Sue[3]

MAURAN v. LAMB.

(Supreme Court of New York, 1827. 7 Cow. 174.)

Assumpsit by the plaintiff as bearer, against the defendant, as drawer, of a check on the Bank of America, dated New York, October 21, 1824, for $1,912.02, payable to No. 25 or bearer.

The cause was tried at the New York circuit, March 25, 1826, before Duer, Judge.

It was admitted at the trial that the plaintiff had no interest in the check, but sued for the benefit of Mrs. Remsen, to whom the check belonged, with her consent.

The defendant objected that the action was not sustainable by the plaintiff in his name; but the objection was overruled. Verdict for the plaintiff.[4]

WOODWORTH, J. It is contended that the plaintiff, being a mere agent, and having no interest, cannot maintain this action. It appears that the plaintiff came fairly by the possession; and his name was used for the benefit of Mrs. Remsen, claiming to be the person in interest. The rule is that the bearer of a note or bill payable to bearer need not prove a consideration, unless he possesses it under suspicious circumstances. 1 Chit. on Bills, 51. If a question of mala fide possessio arises, that is a fact to be raised by the defendant, and submitted to the jury. Conroy v. Warren, 3 John. Cas. 259, 2 Am. Dec. 156. In that case, Mr. Justice Kent referred to Livingston v. Clinton, decided July term, 1799, where the law was laid down that, if a note be indorsed in blank, the court never inquires into the right of the plaintiff, whether he sues in his own right or as trustee; that any person in the possession of a note may sue; and he says a decision to the like effect (Cooper v. Kerr) was, in March, 1800, affirmed in the Court of Errors. In Payne v. Eden, 3 Caines, 213, the note was indorsed to the plaintiff. He had no interest, but was merely a trustee for others. No objection was taken to his want of interest. The question was as to the consideration of the note, and, that being illegal, the plaintiff failed. Thompson, Justice, who delivered the opinion of the court, considered the cause in the same point of view as if the original parties were before the court. In consequence of proving that the plaintiff has no interest, the remedy is not defeated; but the defendant is permitted to avail himself of a defense against the original party. It is no answer to say that the defendant cannot plead a set-off against the cestui que trust.

[3] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 92a.

[4] The statement of facts is abridged, and the arguments of counsel and part of the opinion are omitted.

It may, in some cases, be a hardship, as such a defense applies to the parties on the record only. The act authorizing a set-off may not be sufficient to meet this case; but the remedy is with the Legislature, not the courts of justice. * * *

New trial denied.

HAYS v. HATHORN et al.

(Court of Appeals of New York, 1878. 74 N. Y. 486.)

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, affirming a judgment in favor of plaintiff, entered upon a decision of the court on trial without a jury (reported below, 10 Hun, 511).

This action was upon a promissory note, alleged in the complaint to have been made by the firm of Hathorn & Southgate, payable to the order of defendant, Frank H. Hathorn, and by him indorsed and transferred to plaintiff.

The facts appear sufficiently in the opinion.[5]

HAND, J. In their answer the defendants denied that the note on which the action was brought was ever transferred to the plaintiff or that he was the legal owner or holder thereof. They further denied that the plaintiff was the real party in interest, and alleged that the Saratoga County Bank was the real party in interest and the owner and holder and should be the plaintiff, and that the note was duly transferred to it instead of to the plaintiff.

Upon the trial, the plaintiff having produced the note which was payable to the order of F. H. Hathorn and indorsed in blank by him, rested. The defendants then offered to prove that the note "was not the property of the plaintiff; that the same was never transferred to him; that he was not the real party in interest; that the note was the property of the savings bank, who is the real party in interest." The evidence was objected to by the plaintiff as immaterial and was excluded. This ruling I think was erroneous and renders necessary a reversal of the judgment.

Under the answer and this offer, the defendants unquestionably proposed to show substantially that the plaintiff had no title, legal or equitable, to the note, and no right as owner to its possession. This might have been done by proving that he was the mere finder or the unlawful possessor, or that the right to its possession and ownership was in the bank, to whom they were liable thereon, or in some other way. This they had a right to show.

It may be that, had their offer been admitted, they would have produced in fact no evidence to sustain it or prevent a recovery, but in considering the validity of their exception to the exclusion, we must

[5] The arguments of counsel are omitted.

assume that the evidence would have fully covered the propositions contained in the offer. And, as remarked in the dissenting opinion in the court below, "unless the defendants are to be precluded altogether from giving any evidence of a matter confessedly issuable, I do not see how this offer could be rejected."

The cases relied upon as justifying the exclusion of the evidence do not go that length. In Cummings v. Morris, 25 N. Y. 625, it was held that the maker of a note could not defeat the plaintiff, not a payee, by proof that the consideration of the transfer to him was contingent upon his collecting the note. Such plaintiff was declared to be the real party in interest on the express ground that the transfer was complete and irrevocably vested in him the title to the note. In City Bank v. Perkins, 29 N. Y. 554, 86 Am. Dec. 332, there was no question of exclusion of evidence, but all the circumstances being proved, it was held that where the cashier of a bank holding commercial paper, pledged it "duly indorsed" to the plaintiff as security for a loan by the plaintiff to his bank, and it had been actually transmitted under his direction to the plaintiff so indorsed, it was no defense to one admitting his liability upon such paper to show lack of authority in the cashier alone to contract a loan for the bank; or the fraudulent diversion by him of the funds received from the plaintiff on such loan. Some remarks in the opinion in that case, not necessary to the decision, are perhaps too broad to be entirely approved, but it is fully conceded in it that proof that the plaintiff had no right whatever to the possession but was a mere finder or had obtained it by some "positive breach of law" would be a defense.

Brown v. Penfield, 36 N. Y. 473, holds merely that proof, by the party liable on a bill, of gross inadequacy of the consideration for the transfer of such bill to the plaintiff does not impeach the validity of such transfer as to the party so liable.

In Allen v. Brown, 44 N. Y. 228, it was decided that, as against the plaintiff holding legal title to the claim by written assignment valid upon its face, the debtor cannot raise the question as to the consideration for such assignment or the equities between the assignor and assignee.

In Eaton v. Alger, 47 N. Y. 345, the note being payable to bearer and produced by the plaintiff upon the trial, it was proved that the payee had delivered it to the plaintiff upon his undertaking to collect it at his own expense and pay to such payee upon its collection a certain sum of money. This was held to show sufficiently that the plaintiff and not the payee was the real party in interest under the Code.

Sheridan v. Mayor, 68 N. Y. 30, reiterates the doctrine that, as against the debtor, the plaintiff holding a written assignment of the claim to himself valid on its face, obtained the legal title and was the real party in interest notwithstanding the fact that the assignment was without consideration and merely colorable as between him and the original claimant. Such assignment is expressly declared to protect the debtor paying the assignee against a subsequent suit by the assignor.

In Gage v. Kendall, 15 Wend. 640, the fact that the prosecution of the note was by its owner and holder in the name of the plaintiff, a stranger to it, without his consent or knowledge, was sought to be set up as a defense, but it was ruled out on the ground that the nominal plaintiff need have no title to or interest in the paper sued upon. We apprehend the Code has changed this, and that such facts would now be fatal to an action. Such a plaintiff could not in any view be the real party in interest. Indeed he would not even have manual possession of the paper.

From this glance at the cases, it appears that it is ordinarily no defense to the party sued upon commercial paper, to show that the transfer under which the plaintiff holds it is without consideration or subject to equities between him and his assignor, or colorable and merely for the purpose of collection, or to secure a debt contracted by an agent without sufficient authority. It is sufficient to make the plaintiff the real party in interest if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor. But, to be entitled to sue, he must now have the right of possession and ordinarily be the legal owner. Such ownership may be as equitable trustee, it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor.

As we understand the scope of the offer in the present case, it went to entirely disprove any ownership or interest whatever, or even right to possession as owner in the plaintiff. It should therefore have been admitted. It may be true that the plaintiff, if this note had been delivered to him with the intent to transfer title, might have lawfully overwritten the blank indorsement with a transfer to himself; it is also true that the production of the paper by him was prima facie evidence that it had been delivered to him by the payee and that he had title to it, but the defendants' offer was precisely to rebut this very presumption, and for aught that we can know the evidence under it would have done so.

The judgment must be reversed and a new trial ordered, costs to abide the event.

DEFENSES

I. Real Defenses [1]

CLARK v. PEASE et al.

(Supreme Judicial Court of New Hampshire, 1860. 41 N. H. 414.)

This is an action of assumpsit, counting upon the promissory note of the three defendants, dated July 26, 1858, for $112.50, payable to one Theodore P. Clark, or order, on the 1st day of the following November, and by the payee indorsed and delivered, on the day of its date, to the plaintiff. There was also a count for money had and received, to the amount of $300. Plea, the general issue.

The defendants offered to prove that, on the day before the giving of the note, all of the makers except Charles Pease were arrested at Ellsworth, in Grafton county, by Calvin Clark, a deputy sheriff, by the procurement and with the aid of the payee, and held by them in custody until the next day, when they were carried by them to Plymouth, and there held in custody until, to effect their liberation, this note was given, the said Charles Pease signing as the surety of the others; that the arrest was made without any warrant or other lawful authority, but it was represented by the sheriff that they were arrested for the criminal offense of malicious mischief, and that he had the right to arrest them without a warrant; that this note, with two others, amounting in all to $250, was given to said Theodore P. Clark to obtain the release from duress of the three principals in the note, and upon the promise by the payee that they should then be set at liberty, and he would prosecute them no further; and upon the execution of the note they were set at liberty accordingly.

The plaintiff excepted to this evidence, as no defense against the indorsee, without proof that he was not the bona fide holder of the note. But the court ruled that, if the note was obtained by duress, it was void in the hands of an innocent indorsee, and thereupon the plaintiff, admitting for the purposes of this trial that the defendants' witnesses would testify to the facts stated, a verdict for the defendants was taken by consent, subject to the opinion of the court; and the questions thus raised were reserved, and assigned to the determination of the whole court.[2]

SARGENT, J. That the case presented is clearly one of duress there can be no question. The abuse of any process, either civil or criminal,

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 93–107.

[2] The arguments of counsel are omitted.

to compel a party, by imprisonment, to do any act against his will except to pay the debt for which he is arrested, is entirely illegal, and the act may be avoided on the ground of duress. Richardson v. Duncan, 3 N. H. 508; Severance v. Kimball, 8 N. H. 386; Shaw v. Spooner, 9 N. H. 197, 32 Am. Dec. 348; Burnham v. Spooner, 10 N. H. 532. Breck v. Blanchard, 22 N. H. 303. Here the arrest was without any warrant or lawful authority. Such duress is a perfect defense, upon all the authorities, to an action between the original parties.

The note in this case was not only void as between the original parties, on the ground of duress, but was given to compromise a charge of crime, and was wholly illegal upon that ground. Plumer v. Smith, 5 N. H. 553, 22 Am. Dec. 478. But the principal question raised here by the ruling of the court is whether such a note is absolutely void in the hands of any holder; and if not, then another question arises upon the exception which was taken by the plaintiff, which is this: After an indorsee has made out a prima facie case by proving the indorsement, etc., and the defendant has shown that the note was obtained from him by duress, upon whom rests the burden of proof? Must the defendant prove that the plaintiff was not the bona fide holder, and that he did not pay a valid consideration for it, as the plaintiff claimed? or, the duress being proved, does that throw the burden of proof upon the plaintiff, to prove how he came by the note, and the consideration he paid, etc., as the defendant claims? We will examine these questions in the order in which we have stated them.

I. Is this note absolutely void in the hands of any holder, however innocent, who has paid a valid consideration for it before it was due?

We find that the law holds certain persons to be incompetent parties to make contracts, on account of want of capacity. It has, therefore, wisely taken care of the interests of those who either have not judgment to contract, as in the case of infants, or who, having judgment to contract, cannot in law have any funds or property to enable them to perform the contract, as in the case of a feme covert; and therefore it has in general rendered the contracts of infants voidable, and those of married women absolutely void. Ch. on Bills, 18. By our law an infant has not capacity to bind himself absolutely by a promissory note, as maker or indorser. Story, Prom. Notes, § 78. So a married woman is incapable, in any case, of becoming a party to a note or bill so as to charge herself with any obligation whatever ordinarily arising therefrom. So contracts made with an alien enemy are absolutely void, upon the ground of disability to contract. This principle has its origin and confirmation in the law of nations. Persons insane, or imbecile in mind, have not the mental capacity to contract. This disability flows from the most obvious principles of natural justice, because persons in that condition—lunatics, idiots, and persons non compos mentis—being bereft of their reason, are, by the rules not only of municipal law but of universal justice, held to be utterly incapable of making contracts, and generally their contracts are absolutely void. Story, Prom. Notes,

§§ 85, 94, 100, 101; Edwards, Bills & Notes, c. 2. There are some other parties that are held to be incompetent to contract, but these are the principal; and there are also some exceptions to some or all of the general rules above stated, which are not now important to be noticed. These doctrines are all familiar as elementary principles.

Contracts, therefore, purporting to be entered into by either of the above parties, are either void, or voidable, as the case may be, alike as against the other party to the original contract, and also, where the contract is assignable, they are void as to such incompetent parties, or are voidable by them, in the hands of any assignee or indorsee. These rules of law are founded upon the most common principles of natural justice and of public policy.

There are numerous other contracts, which, though made between competent parties on both sides, are nevertheless void as between such original parties. A contract made on Sunday, where the transaction of such business is prohibited, is an illegal contract, and void as between the parties. So a contract based upon an illegal consideration—as usury, gaming spirituous liquors sold without license contrary to law, the compounding of a felony, etc.—is void as between the parties. So a contract without consideration, nudum pactum, and one where the consideration has failed, as between the immediate parties, is void or voidable. So a contract entered into by compulsion under duress, or obtained by fraud, or circumvention of one in a state of intoxication, is void as between the parties. Other cases might be stated (see Ch. on Bills, 82–87), but these are sufficient for our present purpose. Where the contract itself is illegal, or is founded upon an illegal consideration, the parties are usually both violators of the law, and stand in pari delicto. In such case any contract for the payment of money or the performance of any service cannot be enforced as between the parties; nor, if money has been paid or property transferred by one party to the other under such contract, where both parties are alike in fault, can it be recovered back, because in such cases "potior est conditio possidentis." But in cases of duress, fraud, or circumvention, the fault was all upon one side, and the innocent party, upon whom the duress or the fraud was practiced, may not only avoid the contract entered into under these circumstances, but if he pay money, or deliver property, he may recover it back again. Now bills and notes stand upon the same foundation as all other contracts do, in all the above respects, so long as they remain in the hands of the original payee.

But bills and notes have another attribute, which other contracts ordinarily do not possess; that is, negotiability. Where a bill or note has been negotiated, and passed into the hands of a bona fide holder before it is due, and for a valuable consideration, in such case the holder acquires rights which did not belong to the payee. He stands in a different relation to the promisor. These additional rights and privileges have been conferred upon such holder by law, for good and sufficient reasons, too well known and understood to need to be stated,

but which are incident to and dependent upon the attribute of negotiability, which these instruments possess. And it may be laid down as the general rule, as the general principle applying to this class of cases, that such a note, thus negotiated and in the hands of such a holder, is not liable to any defense which the maker had as against the original payee. To this general rule there are some exceptions, among which are:

1. When a statute not only prohibits the making of a contract, but provides that the same shall be void to all intents and purposes, or where the law provides that any contract made or securities given upon any illegal consideration shall be absolutely void, then the note which embodies such contract, or is based upon such consideration, is held void, everywhere and in the hands of every holder. In England, and in most of the United States, there are or have been laws against usury, which not only, by a general prohibition of usury, made that an illegal consideration for a note, but also provided that all bills or notes founded upon such a consideration should be absolutely void. Such, however, is not the law in this state on that subject, and it is believed that we have no statutes with similar provisions. Hence here usury may be a good defense to a note as against the original party, but not as against an innocent indorsee, for value, etc.

2. When the note is a forgery, it is void everywhere.

3. When the maker belongs to a class of persons who are ordinarily, and as a general rule, on grounds of public policy, held incompetent to contract at all, such as infants, married women, alien enemies, and insane persons, including spendthrifts and others under guardianship, who have been by some statute declared incompetent to contract.

4. Notes signed by agents without authority.

In none of these cases (except the first, which, as we have seen, does not apply in this state) is a note valid in the hands of any one; and the party who discounts such paper is bound to inquire, at his peril, whether the note offered to him is signed by a party capable and competent in law to bind himself, or by an agent duly authorized to bind his principal. Beside this, he is bound to inquire whether the party from whom he receives it is competent to make such transfer in his own right, or is authorized to do it for his principal, for whom he assumes to act.

If there is a failure in either of these points of capacity or authority, it will not avail the party that he is a bona fide holder, for value, without notice. He must look to his indorser if he has one, and if he has not he must suffer loss.

5. Another case might be mentioned, which has been made an exception to the general rule above stated by express provisions of the statute—as where a note is attached by the trustee process. There, by operation of the statute, the maker of a note may have a perfect defense against an indorsee, for value, without notice, and before due. So notes discharged by operation of insolvent laws might afterward be

transferred, by possibility, so as to form another exception, where the indorsee, holding the note bona fide, etc., might be met with a perfect defense on the part of the maker. But these last cases throw no light upon the question we are considering. These are the principal, perhaps all, the exceptions to the general rule above stated, that no defense is available against an innocent indorsee, for value paid before due. But where the contract was illegal, being prohibited by law, or the consideration was illegal, as usury, wagers, compounding a felony, restraint of trade or of marriage, etc., or where there was a want or failure of consideration, and even where the note has been paid—all these defenses, and many more, cannot be made against the note in the hands of such a holder. And the question here raised is whether, in case of duress or fraud, where there is mala fides, but it is all on one side, and the other party to the note has been induced to sign it by force or by fraud, and is in every respect an innocent party, such defense shall avail him as against such a holder, for value, etc., who seeks to collect it.

And we think such a defense cannot avail the maker against such an indorsee of the note. The authorities favor this view. Kent, in his Commentaries (volume 2, § 39), speaks of contracts generally, and on page 453 says: "If a contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by plea of duress; and it is requisite to the validity of every agreement that it be the result of a free and bona fide exercise of the will. Nor will a contract be valid if obtained by misrepresentation or concealment," etc.

He here speaks evidently of the contract as between the original parties to it, or of contracts in general as distinguished from negotiable notes and bills; because he devotes another chapter especially to a consideration of bills and notes, in which he says, in speaking of the right of the holder (volume 3, pp. 79, 80), that a bona fide holder can recover upon such note, though it came to him from a person who had stolen or robbed it from the true owner, provided he took it innocently in the course of trade, for a valuable consideration, and under circumstances of due caution; and he need not account for his possession of it unless suspicion be raised. This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. Suspicion must be cast upon the title of the holder by showing that the instrument had got into circulation by force or fraud, before the onus is cast upon the holder of showing the consideration he gave for it.

Chitty says (Ch. on Bills, 72): "In general there will be a sufficient defense between the original parties when the bill or note was obtained by duress, or by fraud, or by circumvention," etc. But he nowhere intimates that any of these defenses would be good against an innocent indorsee; but, on the contrary, he expressly says (page 79): "The circumstance of a bill or note having been obtained without adequate consideration, or even by duress or fraud, or misapplied by an agent to his own use, affords no defense where the instrument comes into

the possession of a bona fide holder, for value, without notice, and before it is due."

So in Edwards on Bills and Promissory Notes (page 325) it is said that "between the immediate parties it may be shown, by way of defense, that a bill or note was obtained by duress, or by fraud, or by circumvention," etc.; but he nowhere intimates that any of those circumstances would constitute an exception to the rule which he states (page 56), that the bona fide holder of negotiable paper, who has paid value for it before its maturity, or who has relinquished some available security or valuable rights on the credit thereof, is entitled to protection, and may recover thereon notwithstanding some of the previous holders procured the same by fraud.

So in Story on Promissory Notes (section 188) it is said, under the head of want of consideration, that notes obtained under duress are void; but it is also said (section 191) that the want or failure of consideration, or mere fraud between the antecedent parties, will be no defense or bar to the title of a bona fide holder of the note, for value, etc. Now we are not able to see what distinction there could be, in fact, between a note the signature to which was obtained by fraud and one where the signature was obtained by duress. Both are equally void as between the original parties; and there can be no better reason in the one case for holding the note void in the hands of a bona fide holder than in the other. "It is requisite to the validity of every agreement that it be the result of a free and bona fide exercise of the will." 2 Kent, Com. 453, ante. Upon this ground, fraud in obtaining the signature would be fatal to precisely the same extent as would duress; there would be no "free and bona fide exercise of the will" in the one case more than in the other.

In Doe v. Burnham, 31 N. H. 431, the rule is laid down very broadly, and without those qualifications and exceptions which we have heretofore seen must necessarily always accompany it. Eastman, J., delivering the opinion in that case, says that, where a note is indorsed in the usual and ordinary course of commercial business, all the authorities "sustain the broad rule that a bona fide holder for a valuable consideration, who becomes such before the dishonor of the note, takes it free from all defenses between prior parties." And see cases there cited. He also quotes Shaw, C. J., in Wheeler v. Guild, 20 Pick. 545, 32 Am. Dec. 231, as stating the rule in Massachusetts substantially in the same way, and then adds: "We are not aware that in this state there is any exception to the universality of the rule."

Now this rule, in the general and broad terms in which it is here laid down, is at once seen to be incorrect, because in case of notes forged, or signed by an agent having no authority, or by an infant, a married woman, an alien enemy in time of war, or an insane person, exceptions to this rule have been seen to exist necessarily. But if the intention was merely to state a general rule, subject to such limitations and exceptions as general rules are usually subject to, it is undoubtedly cor-

rect; and in that view it is broad enough to cover our present case, because in this case the signature to the note is genuine, and no forgery. No question of agency or authority arises, nor does the signer belong to either of the classes whom the law holds incompetent to contract.

Suppose an individual, then, were about to purchase a note payable to bearer, before it was due, and pay a fair equivalent for it, with a view of collecting it of the maker, and where he is to have no indorser to rely upon; what would be his duty in order to proceed safely? First, he must assure himself of the genuineness of the signature, or, if it purported to be signed by an agent, he must assure himself that the agent was duly authorized to bind his principal in that particular; secondly, he must make such inquiries, which, ordinarily, he may easily do, as to ascertain that the signer is not an infant, a married woman, an alien enemy, an insane person, etc.—that he does not belong to a class of persons who are always presumed by the law to be incompetent to contract; and, thirdly, he might need, for his own safety, to inquire whether the signer of the note had been trusteed, or whether any other special statute could affect his claim to it. When he has satisfied himself upon these points, if he learns of no other defects and the signer is of sufficient ability to respond, he may purchase; and there is generally very little trouble in ascertaining these facts. They are usually matters of public notoriety, about which there can be little room for mistake.

But suppose that, after being satisfied upon all these points, and having purchased the note, it should prove that it was an illegal contract, or was for an illegal consideration; who shall suffer, the maker, or the indorsee? This is settled on the best of authority. The original parties stood upon equal ground, both being in fault, and could neither of them enforce the contract; yet neither shall be allowed to take advantage of his own wrong as against an innocent indorsee.

And suppose it should turn out that his note was obtained of the maker by fraud or by duress, a case in which the maker was in no fault; what rule shall be applied here? The long-established one, that where one of two innocent persons must suffer the loss should fall upon him who has suffered a negotiable security, with his name attached to it, to get into circulation, and thereby mislead the indorsee. Such rules, and such an application of them, are necessary to give security to negotiable paper.

The defendant's counsel claim that the same rule that would hold the maker of a note, who signed it under duress, to pay it to the innocent holder, for value, would hold infants, and others who are incompetent to contract, to pay their notes when thus held; but this is neither a legal nor a logical sequence. The infant belongs to a class, all of whom are held by law to be incompetent to bind themselves by their contracts. In the other case, the man belongs to a class amply competent to contract, is under no general disability as the infant is, is never to be presumed to have signed any note under duress, because that is a condition never

to be presumed in case of a free man, who may have signed a thousand notes and never have signed but this one under duress. Is suspicion to be cast upon all notes that are known to be properly signed, and against men under no disability, simply because it is possible that such a note may be obtained by duress or fraud?

Take also the case of a slave. There the general rule is that he is incompetent to contract; and if a man were about to purchase a note, and, upon inquiry as to who the signer was, should learn that he was a slave, that would be sufficient notice to him that the note was void, because all contracts made by all slaves usually are so, because while in that condition they must necessarily be constantly under duress of body, mind and will. But when it is ascertained that the signer is a free man, then the presumption is that he is never under duress, and there are only rare exceptions to this general rule; and to say that in such exceptional cases the maker shall be allowed to stand upon such a defense against an innocent holder for value, taking it in the ordinary course of mercantile business before the maturity of the note, would be to overthrow all confidence in negotiable paper, and entirely reverse the policy of the whole system of mercantile law. The exception to the ruling of the court upon this point must be sustained; but we shall find that the numerous authorities which bear upon the next question to be considered have also a direct bearing upon this point.

II. Next let us inquire, upon whom is the burden of proof, after duress, or fraud, or illegality of consideration is proved? Must the defendant not only prove that he had a perfect defense to the note originally, but also show that the indorsee had notice of the defect, or that he paid no consideration for it, or that he is not in some way the bona fide holder of the note? Or must the plaintiff, after such defense to the original contract is proved, assume the burden of proving that he is a bona fide holder, for a valuable consideration, without notice of any defect, and that it came seasonably into his hands?

In Collins v. Martin, 1 B. & P. 651, Eyre, C. J., says: "No want of consideration, or other ground to impeach the apparent value received, was ever admitted in a case between an acceptor or drawer and a third person holding the bill for value; and the rule is so strict that it will be presumed that he does hold for value till the contrary appears. The onus probandi lies on the defendant." This case is cited approvingly in Doe v. Burnham, 31 N. H. 432, though the question we are now considering was not there raised. But the case of Collins v. Martin goes further than this, and holds that where the defendant has first proved that the note or acceptance had been obtained by felony, by fraud, or by duress, that so far tended to throw suspicion upon the indorsement as to call on the plaintiff, the indorsee, to prove that he paid value for it.

This is unquestionably the correct rule, as also stated by Parker, J., in Heath v. Sansom, 2 B. & Ad. 291, although the majority of the court in that case came to a somewhat different conclusion, and held

that "in all cases where, from defect of consideration, the original payees cannot recover upon the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself, or a prior indorsee." The same doctrine is held in Brown v. Philpot, 2 M. & Rob. 285.

But these decisions were soon overruled, so far as a mere want or failure of consideration was concerned.

In Bailey v. Bidwell, 13 M. & W. 73, it was held by the Court of Exchequer that if, to an action on a bill or note, the defendant pleads that it was illegal in its inception, and that the plaintiff took it without value, the illegality being proved, the onus is cast upon the plaintiff of proving that he gave value. The reason of the rule is there stated by Parke, B., who says: "It certainly has been, since the later cases, the universal understanding that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and place it in the hands of another person to sue upon it, and that such proof casts upon the plaintiff the burden of showing that he was a bona fide indorsee for value." Alderson, B., adds: "It appears to me that, though the defendant is bound to aver in his plea both the illegality and want of consideration, yet if he proves the illegality, and the plaintiff does not prove the giving of the consideration, the plea is maintained."

And in Smith v. Braine, in the Queen's Bench, 3 E. L. & E. 379, Campbell, C. J. says: "But since the new rules, judges have, with entire approbation, directed juries that where the bill was illegal in its inception, or where the immediate indorser to the plaintiff obtained possession of it by fraud, the want of consideration as between him and the plaintiff may be presumed."

In Duncan v. Scott, 1 Camp. 100, which was an action by the indorsee against the drawer of a bill, the defendant had given the bill without consideration, and while under duress. Lord Ellenborough held that, upon these facts being proved by the defendant, the plaintiff must prove that he gave value for it before he could recover, even though it was indorsed to him before it became due.

Rees v. Headfort, 2 Camp. 574, was an action by an indorsee against the acceptor of a bill. The drawer had received no consideration, but had been tricked out of the bill by a gross fraud. Upon proof of these facts by the defendant, Lord Ellenborough held that it was incumbent on the plaintiff to show some consideration paid for the bill; and, not doing so, he was nonsuited.

Bayley, in his work on Bills (page 372), says: "In many cases the plaintiff is compellable to prove that either he, or some preceding party, took the note bona fide, or for value—as in case of a bill or note originally given without consideration, and while the person giving it was under duress, or in case of a bill or note obtained by fraud, or in

case of a delivery by a person not entitled to make it, as in the instance of bills or notes that have been stolen or lost."

In Mills v. Barber, 1 M. & W. 425, Lord Abinger, C. B., says: "Where there is no fraud, nor any suspicion of fraud, but the simple fact is that the defendant received no consideration for his acceptance, the plaintiff is not called upon to prove that he gave value for the bill; but if the bill be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, or that it has been clandestinely taken away, or has been lost or stolen, the holder will be required to show that he gave value for it." And (page 432) "if, in an action by an indorsee against the acceptor of a bill, the ground of defense be that the bill was obtained illegally from the defendant, and indorsed to the plaintiff without consideration, the defendant will be bound in his plea to aver both the illegality and the want of consideration; and if, at the trial, he proves the illegality, such proof will, according to the rule above stated, throw upon the plaintiff the onus of showing that he gave consideration for the bill." The same doctrine is held in Bingham v. Stanley, 2 A. & E. (N. S.) 117; Berry v. Alderman, 24 E. L. & E. 318.

In De La Chaumette v. Bank of England, 9 B. & C. 208, where the defendant had proved that the bill was stolen, it was held that it was incumbent on the plaintiff to show that the foreign merchant, who assigned it to him, gave full value for it.

In Harvey v. Towers, 4 E. L. & E. 551, 6 Exch. 656, Pollock, C. B., says: "This is an action on a bill of exchange, with a plea of fraud, which, according to the ordinary course of pleading, contains an allegation not merely of the fraud in obtaining the bill, but that the plaintiff gave no consideration for it. In point of law, that last allegation was necessary to make the plea a perfect answer to the action; for though a bill of exchange may have been originally concocted in fraud, or obtained by fraud, though it may have been stolen, or a party may have been swindled out of it, this is no defense to an action by the holder unless he has obtained it without giving value, and he may sue on it notwithstanding such defect in the title of some one else." He also holds that proof of fraud alone, by the defendant, is a sufficient sustaining of this plea to throw upon the plaintiff the burden of proving consideration; and where there is evidence of fraud for a jury, the judge should call on the plaintiff for such proof, with instructions to the jury that, if they find the fact of fraud proved, the plaintiff must satisfy them that he gave consideration for the bill.

In accordance with the doctrine of these cases last cited is Greenleaf on Evidence (section 172), where it is said: "In an action by the indorsee against the original party to the bill, if it is shown on the part of the defendant that the bill was made under duress, or that he was defrauded of it, or if a strong suspicion of fraud be raised, the plaintiff will then be required to show under what circumstances and for what

value he became the holder. It is, however, only in such cases that this proof will be demanded of the holder. It will not be required where the defendant shows nothing more than a mere absence or want of consideration on his part." See also Bramah v. Roberts, 1 Bing. N. C. 469; Low v. Chifney, 1 Bing. N. C. 267.

So in 2 Phil. Ev. (4 C. & H.) 8, it is said that in some cases the plaintiff, in an action upon a bill of exchange or promissory note, must prove that he or some preceding party took the bill or note bona fide, and for value, as where bills or notes have been obtained by fraud, or under duress, or have been stolen or lost. When the plaintiff has established a prima facie case, it then remains for the defendant, if he can, to impeach his title; and until he has first cast some suspicion on the title by showing that the note was lost, or obtained by force or fraud, he cannot cast the burden of proof upon the plaintiff. See, also, Heyden v. Thompson, 1 A. & E. 210; 1 Saund. on Pl. & Ev. 304, 305; Ch. on Bills, 79; Bayley on Bills, 500.

And in Smith's Mercantile Law, 320, it is said that the defenses of duress, fraud, etc., will not prevail against a bona fide holder.

The same doctrines very generally prevail in this country, wherever the subject has received judicial consideration. Munroe v. Cooper, 5 Pick. (Mass.) 412; Woodhull v. Holmes, 10 Johns. (N. Y.) 231; Vallett v. Parker, 6 Wend. (N. Y.) 615; Small v. Smith, 1 Denio (N. Y.) 583; Worcester County Bank v. D. & M. Bank, 10 Cush. (Mass.) 488, 57 Am. Dec. 120; Wyer v. D. & M. Bank, 11 Cush. (Mass.) 52, 59 Am. Dec. 137; Rockwell v. Charles, 2 Hill (N. Y.) 499; Bissell v. Morgan, 11 Cush. (Mass.) 198; Crosby v. Grant, 36 N. H. 273. So in Smith on Cont. (3d Am. Ed.) 277 (*187), in a note by Rawle, it is said that in New York it has been held that, as soon as the defendant shows there has been usury between the prior parties, he casts on the plaintiff the burden of proving that he is a holder for value, as is the case in every instance where fraud, duress, or illegality is shown between the prior parties.

These authorities would seem conclusive that the plaintiff's exception —that the evidence offered would have been no defense unless it were proved that he was not the bona fide holder—must be overruled. When the defendant had proved the duress, he had made a good defense as against the original party; and because of the legal presumption that in such cases the payee, being guilty of such illegality, would dispose of the note and place it in the hands of some other person to sue upon it (Bailey v. Bidwell, supra), he had thereby cast a suspicion on the plaintiff's title, which threw the burden upon him of showing affirmatively that he was a bona fide holder for value. Nor can we see that the fact that this evidence was offered under the general issue alters the position of the parties or the state of the case.

These authorities also bear directly upon the first point taken by the defendant that duress is a defense against any holder, however innocent he may be, and however valuable a consideration he may have paid

for the note; and if other authorities on this point were needed they are not wanting. In Powers v. Ball, 27 Vt. 662, Redfield, C. J., says: "Illegality, duress, fraud, and want or failure of consideration are no defenses as against a bona fide holder for value." See, also, St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295; Ellicott v. Martin, 6 Md. 509, 61 Am. Dec. 327; Minell v. Reed, 26 Ala. 730; Norris v. Langley, 19 N. H. 423; Knight v. Pugh, 4 Watts & S. (Pa.) 445, 39 Am. Dec. 99.

The verdict must be set aside, and a new trial granted.

GEO. ALEXANDER & CO. v. HAZELRIGG.

(Court of Appeals of Kentucky, 1906. 123 Ky. 677, 97 S. W. 353.)

This action was instituted by appellant, doing business as Geo. Alexander & Co., against the appellee, upon the following promissory note: "$1,592.90. Mt. Sterling, Ky., Sept. 14th, 1904. Sixty days after date, we jointly and severally promise to pay to Desha Lucas, or order, fifteen hundred and ninety-two and $^{90}/_{100}$ dollars, negotiable and payable at the Montgomery National Bank, Mt. Sterling, Ky., value received, with interest at 6 per cent. per annum. [Signed] John W. Hazelrigg." From a judgment in favor of defendant, plaintiff appeals.[3]

NUNN, J. The real question to be determined is whether a negotiable note executed for money lost on a bet or wager can be successfully defended, when owned and held by an innocent purchaser for value without notice of the infirmity or illegal consideration of the note. As we understand the appellant's petition, he concedes that prior to the passage and the taking effect of the negotiable instrument act, referred to, such a note could be successfully defended in the hands of an innocent purchaser; but since that act took effect he contends that all laws inconsistent with that act stood repealed. He claims that under section 57 the question of consideration cannot be inquired into as against the holder in due course. He takes the paper free from defenses. And in support of this position we are referred to the case of Wirt v. Stubblefield, 17 App. D. C. 283. In that case it was held that the section, the same as section 57 referred to above, changed the law of the District of Columbia as to a note given for a gambling debt in the hands of a holder in due course; the court saying: "We know, moreover, that the great and leading object of the act, not only with Congress, but with the larger number of the principal states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect

[3] The statement of the case is taken from the opinion of the court. Part of the opinion is omitted.

of mere local laws and usages that have hitherto prevailed. The great object sought to be accomplished by the enactment of the statute is to free the negotiable instrument as far as possible from all latent local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute."

It has been the policy of this state to suppress gaming, and the statutes making gaming contracts void are founded upon what the Legislature has for many years deemed to be sound public policy. It is inconceivable that the General Assembly, in the passage of the act of 1904 for the protection of innocent holders of negotiable instruments, intended to or did repeal section 1955, Ky. St. 1903, which declares all gaming contracts void. In our opinion, the disappointment now and then of an innocent holder of a negotiable instrument would not be as hurtful and injurious to the best interests of the state as the removal of the ban from gaming contracts. Mr. Daniel, in his work on Negotiable Instruments (section 197), says: "The bona fide holder for value, who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed mala in se, and those founded in positive statutory prohibition, which are termed mala prohibita. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having a bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule—that when a statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it."

In the case of Sondheim v. Gilbert, 117 Ind. 71, 18 N. E. 687, 5 L. R. A. 432, reported in 10 Am. St. Rep., at page 23, the court said: "In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as plaintiffs are conceded to be, it is essential that a statute should be shown governing the case, which in direct terms declares that transactions such as those here involved are unlawful, and that notes given under circumstances exhibited by the facts in this case are absolutely void. The principle may be considered as well established that when a statute in express terms pronounces contracts, bills, securities, and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon; and the doctrine that transactions which a statute in direct terms declares to be unlawful cannot acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authorities." And the authorities are referred to,

and the court continues: "In such a case, the note will be declared void in the hands of an innocent holder."

In the case of Bohon's Assignees v. Brown, etc., 101 Ky. 355, 41 S. W. 275, 38 L. R. A. 503, 72 Am. St. Rep. 420, the court said: "In the case of Cochran v. German Insurance Bank, 9 Ky. Law Rep. 196, the superior court held that 'a bill or note based upon a gambling consideration is absolutely void, and the drawer or maker is not bound to even an innocent holder.' And in the case of Farmers' & Drovers' Bank of Louisville v. Unser, 13 Ky. Law Rep. 966, the court says: 'The whole current of authority is that the obligor may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the Legislature that such an illegality makes the contract void.' "

For these reasons, the judgment of the lower court is affirmed.

GREEN et al. v. GUNSTEN et al.

(Supreme Court of Wisconsin, 1913. 142 N. W. 261.)

Action by Sigmond Green and another against Neil Gunsten and another. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Action on a promissory note, dated February 16, 1911, for $300, payable six months after date, alleged to have been executed and delivered by the plaintiffs to the defendants. The defendant Gunsten answered denying that he signed the note, and averred that his signature to the same was a forgery. He also set up the defense that, if he did sign the note, his signature thereto was procured by connivance and conspiracy between the plaintiffs and his comaker of the note, O. C. Loomis, and other persons acting for and on behalf of O. C. Loomis, by reason of which said O. C. Loomis and others, acting for and on behalf of him, encouraged and induced the defendant Gunsten to drink of intoxicating liquors in such large quantities that he became so intoxicated that he was deprived of his reason and understanding, and that if he did sign his name to said note it was done while in such condition and was not done of his own free will and consent; that he received no consideration whatever for said signature; and that the note was used by his comaker, O. C. Loomis, to secure his obligations to the plaintiffs, incurred prior to the making of the note and accepted by plaintiffs as security for such obligations.

The jury returned a verdict finding: (1) That the defendant Gunsten on or about February 16, 1911, did sign and turn over to the defendant Loomis the promissory note sued upon in this action; and (2) that said Gunsten at the time of signing said note was so completely intoxicated that he was temporarily deprived of his reason and understanding. Upon such verdict, and on motion of defendant Gunsten, the court ren-

dered judgment in his favor dismissing the action, with costs. From such judgment the plaintiffs appealed.

VINJE, J. (after stating the facts as above). It is admitted that defendant Gunsten was an accommodation maker of the note if it was executed under such circumstances as to constitute him a maker in any sense. Plaintiffs claim they were holders in due course, which claim the defendant Gunsten disputes. The trial court, in the disposition of the case, evidently treated plaintiffs as such holders, and we shall assume that they were. That raises the question whether or not total or complete drunkenness on the part of the accommodation maker of a note at the time of the execution and delivery thereof is a defense as against a holder in due course.

[1] On the grounds of public policy and the necessities of commerce, some courts have held that complete drunkenness on the part of the maker of a note at the time of its execution and delivery is no defense against a holder in due course. State Bank v. McCoy, 69 Pa. 204, 8 Am. Rep. 246; McSparran v. Neeley, 91 Pa. 18; Smith v. Williamson, 8 Utah, 219, 30 Pac. 753. The basis for the rule is thus stated by Joyce, Defenses to Com. Paper, § 69: "The reasons underlying this rule are that, when a man has voluntarily put himself in such a condition and a loss must fall on one of two innocent persons, it should fall on him who occasioned it. It is also founded on principles of public policy and the necessities of commerce. The circulation and currency of negotiable paper should not be unnecessarily impeded, and, if drunkenness of the maker were a defense to a note in the hands of an indorsee, it would clog and embarrass the circulation of commercial paper, and no man could safely take it without ascertaining the condition of the maker or drawer when it was given, though there be nothing unusual or suspicious about the appearance of the note." That this rule is founded, at least in part, upon substantial grounds of public policy cannot be denied. Though it should be observed that drunkenness alone, without the fraud or fault of another, does not lead to the signing of notes. In every case, as in the case at bar, the drunken maker has been taken advantage of by a designing payee or third party, and it is not strictly correct to say that the fault is that of the drunken maker alone. Were that so, there would be more reason for applying the rule that, where loss must fall upon one of two innocent persons, it should fall on him who occasioned it. Nor can a holder in due course always rest upon the assumption that the maker of a note is competent to execute it. Insanity of the maker is a good defense against a bona fide holder, for the latter takes it charged with constructive notice of the legal disability of the maker. 1 Daniel, Neg. Inst. §§ 209, 210; Joyce, Def. to Com. Paper, § 71.

It is no greater hardship to charge a holder in due course with constructive notice of the incapacity of the maker resulting from complete drunkenness than from insanity. It is deemed that a doctrine more in consonance with the spirit of our decisions is stated by Daniel

as follows: "If the drunkenness were so complete as to suspend all rational thought, the better opinion is that any instrument signed by the party would be utterly void, even in the hands of a bona fide holder without notice, for, although it may have been the party's own fault that such an aberration of mind was produced, when produced, it suspended for the time being his capacity to consent, which is the first essential of a contract." 1 Daniel, Neg. Inst. (5th Ed.) § 214; 1 Parsons, Notes & Bills, 151; Gore v. Gibson, 13 M. & W. 623. But the drunkenness must be so complete as to deprive the maker of the use of his faculties. Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; Caulkins v. Fry, 35 Conn. 170. Intoxication merely to the extent that he cannot give the attention to it that a reasonably prudent man would be able to give is not sufficient. Wright v. Waller, 127 Ala. 557, 29 South. 57, 54 L. R. A. 440. See authorities cited in note as to degree of intoxication that will avoid a contract. The rule that complete drunkenness is available as a defense in a suit upon a contract has been clearly recognized by our own court. Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176, 100 Am. St. Rep. 895.

In Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848, the contract under consideration was the assignment of an insurance policy, and the court said: "The evidence tended to show that, by reason of his intoxication, he was incapable of comprehending what he was doing at the time he executed said assignments, and was therefore within the well-established rule of law that a drunkard, when in a complete state of intoxication, so as not to know what he is doing, has no capacity to contract. 1 Benj. on Sales (Am. Ed. Corbin) 42; Gore v. Gibson, 13 Mees. & W. 623; Cooke v. Clayworth, 18 Ves. Jr. 12; Story on Cont. (4th Ed.) §§ 44, 45, and cases cited in notes; Belcher v. Belcher, 10 Yerg. [Tenn.] 121; French's Heirs v. French, 8 Ohio, 214 [31 Am. Dec. 441]; Jenners v. Howard, 6 Blackf. [Ind.] 240; Mitchell v. Kingman, 5 Pick. [Mass.] 431; Webster v. Woodford, 3 Day [Conn.] 90; Seaver v. Phelps, 11 Pick. [Mass.] 304 [22 Am. Dec. 372]; Rice v. Peet, 15 Johns. [N. Y.] 503."

In Burnham v. Burnham, 119 Wis. 509, 97 N. W. 176, 100 Am. St. Rep. 895, the rule is stated thus: "A person addicted to the habitual and excessive use of intoxicating liquor is not incompetent to enter into contracts and convey property, unless it appears that actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed. Johnson v. Harmon, 94 U. S. 371 [24 L. Ed. 271]; Van Wyck v. Brasher, 81 N. Y. 260; Reinskopf v. Rogge, 37 Ind. 207."

The reason for the rule is that there can be no valid contract where there is no mind capable of contracting. That drunkenness may be so complete as to render a person utterly incapable of comprehending the nature of his acts or that he is acting at all is a fact as sad as it is true. "Drunkenness," says Tiedeman, "is, in legal contemplation, an aber-

ration of mind similar in its effect upon the reasoning faculties as temporary insanity. Hence we find that the legal effect of contracts made by one in a state of intoxication is affected in the same way by the intoxication of the contractor as they are by his insanity." Tied. Com. Pap. § 57.

[2] If complete drunkenness, by which is meant drunkenness to such an extent as to wholly destroy for the time being the rational faculties of the mind, renders a note absolutely void as between maker and payee, then, under the provisions of our Negotiable Instrument Law (St. 1911), it is void in the hands of a holder in due course.

Section 1676—25 provides: "The title of a person who negotiates an instrument is defective within the meaning of this act when he obtains the instrument, or any signature thereto, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud and the title of such person is absolutely void when such instrument or signature was so procured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

And section 1676—27 reads: "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon except as provided in sections 1944 and 1945 of these statutes, relating to insurance premiums, and also in cases where the title of the person negotiating such instrument is void under the provision of section 1676—25 of this act."

By the provisions of this law it will be seen that a holder in due course takes no title where the note was absolutely void in its inception, as where there was no maker capable of executing the instrument. This result follows for the obvious reason that no life, or validity, can be given by transfer to that which is absolutely void. It is the same as if it had no existence at all. And it is but the expression of the rule embodied in the decisions of this court. Aukland v. Arnold, 131 Wis. 64, and cases cited on page 67, 111 N. W. 212.

[3] Plaintiffs argue that the rule of ordinary care, as applied in negligence cases, obtains under the provisions of section 1676—27 of the Negotiable Instruments Law. It is not necessary to decide the question in this case. The jury found that at the time Gunsten signed the note he was so completely intoxicated that he was temporarily deprived of his reason and understanding. Manifestly, while in such condition, the rule of ordinary care does not apply. He was incapable of exercising any care whatever. Nor can it be held that he should have exercised care not to get drunk, for, as before observed, the signing of notes is not the usual or probable result of drunkenness. It is otherwise as to a personal injury. A man may well reasonably anticipate that if he gets drunk and becomes unable to care for himself he may,

without the fault of another, sustain bodily harm, or even death itself. But a drunken man, if left alone and not taken advantage of by others, is not, as a mere result of the drunkenness, likely to sign notes or execute any other contracts. The law does not favor drunkenness; nor does it place in the hands of a drunkard any shield against his conscious or rational acts. It simply says that when, through drunkenness or any other means, a man is temporarily or permanently wholly incapacitated from exercising his rational faculties, then he shall not be liable upon what purports to be a contract entered into while in such state, because a mind bereft of reason or conscious rational action is incapable of consenting or contracting. In speaking of the early English doctrine holding that a man should not be allowed to stultify himself by alleging his own lunacy or imbecility, Daniel says: "Such doctrine sounds more like the gibberish of a lunatic than like the decree of a humane and enlightened lawyer. The maxim of the civil law, 'Furiosus nullum negotium agere potest, qui non intelligit quid agit,' expresses the sense of modern jurisprudence on the subject." 1 Daniel, Neg. Inst. § 209. The same maxim applies equally well to a person in a state of complete intoxication as to an act or result that cannot be said to be reasonably anticipated from mere drunkenness.

Judgment affirmed.

DRUM v. DRUM.

(Supreme Judicial Court of Massachusetts, Barnstable, 1882. 133 Mass. 566.)

Contract upon a promissory note for $100, dated October 19, 1869, payable on demand to the plaintiff, or order, signed by the defendant, and witnessed. Writ dated September 28, 1878. Trial in the superior court, before Brigham, C. J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered the note in evidence; and the signatures of the defendant and of the attesting witness were proved. It appeared that the note, after its delivery to the plaintiff, who could neither read nor write, had been changed in the following respects: The figures "$100" had been made to read "$136," or "$156"; the word "dollars" had been made to read "fifty," or "thirty," the word "six" being interpolated thereafter; and the word "on" changed to "dollars," and another word "on" interpolated before the word "demand."

The plaintiff testified that he knew nothing about the erasures and changes above described, and neither made them himself, nor directly or indirectly authorized the same to be made; and the agent of the plaintiff, in whose possession the note was left for a time, testified the same as the plaintiff, as to her knowledge of, and relation to, said erasures and changes.

The defendant objected that the plaintiff was not entitled to recover upon the note, unless he first explained and accounted for said changes

and erasures; and that there was a variance between the plaintiff's allegations and the proofs.

The plaintiff asked the judge to instruct the jury as follows: "If the jury believe that said $100 note was altered without the knowledge or consent of the plaintiff, and without his agency, directly or indirectly, it is not, in law, an alteration, but a mutilation or spoliation; and the note would be good for, and according to, its original tenor."

The judge declined to give this instruction; but instructed the jury as follows: "The note of $100, appearing to be materially altered, is void, unless the plaintiff proves that it was altered by consent of the defendant, or proves the circumstances of its alteration as well as that he did not make or procure it. The alteration would not be sufficiently explained by proof that the plaintiff did not make, direct or procure it."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

Colburn, J. The note declared on in this case was for $100, signed by the defendant, and payable to the plaintiff, or order. Upon the production of the note, it appeared to have been changed from a note for $100 to a note for $136, or $156, in the manner stated in the exceptions.

It was proved at the trial that this note was originally a valid note for $100, and it was not pretended that it had ever been changed with the knowledge or consent of the defendant. The note was not indorsed, and, so far as appears, had always been owned by the plaintiff, and in his possession or in that of his agent.

These changes, under the circumstances, rendered the note prima facie void, and the burden was upon the plaintiff to explain them. If the changes had been made by the plaintiff, or by his authority or consent, directly or indirectly, the note was absolutely void. Adams v. Frye, 3 Metc. 103; Fay v. Smith, 1 Allen, 477, 79 Am. Dec. 752; 1 Greenl. Ev. § 564. But if the changes had been made by a stranger, without the knowledge or consent of the plaintiff, directly or indirectly, the note remained a valid note, according to its original tenor. Adams v. Frye, ubi supra; 1 Greenl. Ev. § 566.

If the plaintiff proved that the note had never rightfully, or to his knowledge, been in the possession of any one but himself and his agent, and that the alterations were not made by him or his agent, or with the knowledge or consent, directly or indirectly, of either of them, he was entitled to recover on the note as originally written, though he might not be able to prove the circumstances of its alteration; and there was evidence tending to show that these were the facts in this case.

We are of opinion that the judge erred in instructing the jury, as he apparently did, in effect, that proof of the state of facts above supposed would not entitle the plaintiff to recover. Of course, we express no opinion as to the credibility of the evidence at the trial, or the proba-

bility that such changes as were made in the note would have been made by a stranger. These are considerations for the jury.

If, as we infer from the exceptions, the tenor of the note as originally written was apparent upon inspection of the note, it was sufficient to declare upon it in the usual way; and, upon showing that the changes in the note were mere spoliations, there would be no variance between the allegation and proof.

Exceptions sustained.

NATIONAL EXCH. BANK OF ALBANY v. LESTER.

(Court of Appeals of New York, 1909. 194 N. Y. 461, 87 N. E. 779, 21 L. R. A. (N. S.) 402, 16 Ann. Cas. 770.)

Appeal from the judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 16, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial.

The defendant was sued as the accommodation indorser upon a note for $375 made by one Frank L. Fancher and acquired by the plaintiff bank before maturity in the regular course of its business. The defense was that the note as originally made and indorsed was for $75 only; that the maker thereafter, without the knowledge or consent of the indorser, altered the note by inserting in the body thereof the words "three hundred" immediately in front of the words "seventy-five" and the figure "3" immediately in front of the figures "75," thereby making the instrument apparently a note for $375 instead of $75; and that the maker thereafter caused the note as thus altered to be discounted by the plaintiff bank. The answer prayed judgment that the complaint be dismissed except as to the amount of the note before alteration, together with interest and protest fees, to wit, $78.66. The defendant also served an offer to allow the plaintiff to take judgment for that amount.

Upon the trial the court charged the jury that, if the note indorsed by the defendant was in fact a note for $375 on its face, the plaintiff was entitled to recover that amount and interest. The trial judge further charged the jury that if they found that there were spaces upon the note "so carelessly and negligently left by this indorser, Mr. Lester, that a person having custody of the note might run in a figure 3 and the words 'three hundred' so as not to occasion in the mind of the indorser [evidently meaning indorsee] any inquiry into its validity," they might find that the indorser conducted himself carelessly and negligently in the premises, and thus invited the liability which the face of the note called for when presented to the bank.

The defendant duly excepted to that part of the charge to the effect that, if the defendant was negligent in leaving blank spaces, the jury must find a verdict for the plaintiff for the full amount of the note as

it stood. The court then reiterated the proposition, saying that, "if the jury find that the defendant was careless and negligent in leaving vacant spaces for the words and figures, such carelessness and negligence on his part would still make him liable for the note;" and to this the defendant also excepted.

The jury found for the plaintiff in the sum of $375, with interest. The judgment entered upon the verdict has been unanimously affirmed by the Appellate Division.

WILLARD BARTLETT, J. As this case went to the jury, they might well have found that the note in suit was a note for only $75 when originally prepared by the maker and indorsed at his instance by the defendant, and that it had subsequently been altered to a note for $375 when discounted by the plaintiff bank. They were instructed in substance, however, that the indorser was liable for the amount of the note as raised by the alteration, if he had been careless and negligent in placing his name upon the instrument while there were spaces thereon which permitted the insertion of the words and figure whereby it was transmuted from a note for $75 into a note for $375. Conceding that the contract which he actually signed bound him only to pay the smaller amount, the jury were permitted to find that in consequence of his negligence in the respect indicated it had become a contract which bound him to pay the larger amount to a subsequent innocent holder of the paper.

In support of the correctness of this ruling, the learned counsel for the respondent asserts the doctrine that "a party to a note who puts his name to it in any capacity of liability, when it contains blanks uncanceled facilitating an alteration raising the amount, is liable for the face of the note as raised to an innocent holder for value"; and he declares that this doctrine has been approved and apparently adopted in Alabama, California, Colorado, Illinois, Kansas, Kentucky, Louisiana, Michigan, Missouri, Nebraska, and Pennsylvania. In considering his proposition, it is important to bear in mind a radical distinction which exists between two classes of notes to which the adjudicated cases relate: (1) Those notes in which obvious blanks are left at the time when they are made or indorsed, of such a character as manifestly to indicate that the instruments are incomplete until such blanks shall be filled up; and (2) those notes which are apparently complete, and which can be regarded as containing blanks only because the written matter does not so fully occupy the entire paper as to preclude the insertion of additional words or figures or both. It is a note of the latter class that we have to deal with here. One who signs or indorses a note of the first class has been held liable to bona fide holders thereof, in some of the cases cited by the respondent, according to the terms of the note after the blanks have been filled, on the doctrine of implied authority, while in other cases, relating to notes of the second class, the liability of the maker or indorser for the amount of the note

as increased by filling up the unoccupied spaces therein is placed upon the doctrine of negligence or estoppel by negligence.

The cases cited by respondent in which parties to commercial paper executed by them while obvious blanks remained unfilled thereon have been held liable upon the instrument as completed by filling out such blanks, on the ground of implied authority, require no further consideration here, as there is no suggestion that there was any blank of this character upon the note in suit. These cases are Winter & Loeb v. Pool, 104 Ala. 580, 16 South. 543; Statton v. Stone, 15 Colo. App. 237, 61 Pac. 481; Cason v. Grant County Deposit Bank, 97 Ky. 487, 31 S W. 40, 53 Am. St. Rep. 418; Weidman v. Symes, 120 Mich. 657, 79 N. W. 894, 77 Am. St. Rep. 603. There were obvious blanks also in the notes under consideration in Visher v. Webster, 8 Cal. 109, and Lowden v. S. C. Nat. Bank, 38 Kan. 533, 16 Pac. 748, and the decision in each of these cases appears to have proceeded upon the doctrine of implied authority rather than negligence.

It must frankly be conceded, however, that the respondent finds support for the doctrine which it asserts in the case at bar in the decisions of Pennsylvania, Illinois, and Missouri, so far as the maker of commercial paper is concerned, and in those of Kentucky and Louisiana, in respect to the liability of a party who has indorsed or become surety upon a note in which there were spaces (not obvious blanks) that permitted fraudulent insertions enlarging the amount. Garrard v. Haddan, 67 Pa. 82, 5 Am. Rep. 412; Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120; Scotland County Nat. Bank v. O'Connel, 23 Mo. App. 165; Hackett v. First Nat. Bank of Louisville, 114 Ky. 193, 70 S. W. 664; Isnard v. Torres & Marquez, 10 La. Ann. 103.

In Garrard v. Haddan, supra, a space was left between the words "one hundred" and the word "dollars" in which "fifty" had been inserted after the maker had signed and delivered it; and the court held the maker answerable to a bona fide holder for the full face of the note as altered on the ground of the negligence of the maker in leaving the space in the note which was thus filled up after execution. "We think this rule is necessary," said Chief Justice Thompson, "to facilitate the circulation of commercial paper, and at the same time increase the care of drawers and acceptors of such paper and also of bankers, brokers, and others in taking it." It is a little difficult to see how the rule tends to make bona fide purchasers more careful, as this last observation suggests.

The case of Yocum v. Smith, supra, held the maker liable upon a note which had been raised after execution from $100 to $120; the words "and twenty" having been inserted in a space left between the word "hundred" and the word "dollars." The court said that the maker had acted with unpardonable negligence in signing the note and leaving a blank which could so easily be filled; that he had thus placed it in the power of another to do an injury; and that he must, therefore, suffer the resulting loss. This decision undoubtedly sustains the posi-

tion of the respondent, although there was another element of negligence in that case which is not present here. It appeared that the maker there was informed by letter by the purchaser, very soon after the date of the note, that he had bought it and of its date and amount; yet he made no objection as to the amount until nearly a year later.

In Scotland County Nat. Bank v. O'Connel, supra, the defendants executed and delivered a note for $100 to one Smith, the body of which was in his handwriting, in a condition which enabled him to add the words "thirty-five" after "one hundred" in the written part and put the figures "$135" at the head of the note in the space where the amount is usually indicated by figures. The St. Louis Court of Appeals held that the defendants were liable for $135 because they had delivered the note to Smith, who was their co-maker, "in such a condition as to enable him to fill blank spaces without in any manner changing the appearance of the note as a genuine instrument."

The cases thus far discussed were all of them actions against the makers of the raised paper. The same rule, however, was applied against an indorser in Isnard v. Torres & Marquez, supra, by the Supreme Court of Louisiana under the following circumstances: Marquez indorsed a note for $150 for the accommodation of Torres. The amount was raised to $1,150, and purchased by the plaintiff in good faith as a note for that sum. The report states that there was testimony of experienced persons to the effect that, if at the time of the indorsement the word "onze" (for eleven, the note being in French) and the additional figure before 150 were not there, "the note would have exhibited blanks which at least with regard to the written part were unusual and calculated to attract attention, and would have rendered the note unsalable in the market." In this opinion, upon inspection of the note, the court expressed its full concurrence. The indorser was held liable for the amount of the note as raised on the ground that he had not exercised proper caution. To the same effect is Hackett v. First Nat. Bank of Louisville, supra, where it was held that a surety who had signed a note in which were written the words "five hundred" with spaces before and after them, which the maker had filled up by writing "twenty" before and "fifty" after them, thereby making a note for $2,550, was liable thereon to a purchaser in good faith. In this case the attention of the Kentucky Court of Appeals was called to the fact that the great weight of authority was the other way, but, in view of the fact that the rule had been so established in Kentucky for a quarter of a century, the court determined to adhere to it, in observance of the principle of stare decisis.

This court is not thus constrained. The question involved in the present appeal has not been authoritatively decided in this state, and we are at liberty to adopt that view of the law which seems to us most consonant with sound reason and best supported by well-considered adjudications in other jurisdictions.

The outcome of these adjudications is accurately set forth, as it seems to me, by Mr. Randolph in his treatise on the Law of Commercial Paper, as follows: "Where negotiable paper has been executed with the amount blank, it is no defense against a bona fide holder for value for the maker to show that his authority has been exceeded in filling such blank and a greater amount written than was intended. This was also once held to be the rule where no blank had been actually left, but the maker had negligently left a space either before or after the written amount which made it easier for a holder fraudulently to enlarge the sum first written. It has now, however, become in America an established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention * * * will constitute a material alteration, and operate to discharge the maker." 1 Randolph on Commercial Paper, § 187.

The rule thus stated is sustained by the decisions of the courts of last resort in Massachusetts, Michigan, New Hampshire, Iowa, Maryland, Mississippi, Arkansas, and South Dakota. In my judgment it rests on a sounder basis than the opposite doctrine, and accords better with such adjudications of this court as bear more or less directly on the question involved.

The leading case sustaining this view is Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67, in which the opinion was written by Chief Justice Gray, afterward an Associate Justice of the Supreme Court of the United States. The discussion is careful and exhaustive, reviewing all the important cases in England and America bearing upon the subject which had been decided up to that time (1877), including that of the Supreme Court of Pennsylvania in Garrard v. Haddan, supra, which was the principal authority the other way. I shall not undertake to review the same authorities here or paraphrase the opinion of Chief Justice Gray which deals with them in such a manner as fully to justify his rejection of the doctrine that the makers of a promissory note apparently complete when they sign it are liable for an amount to which it may subsequently be raised, without their knowledge or consent, on the ground that they were negligent in permitting spaces to remain thereon in which the figures and words which affected the increase could be inserted. In support of his conclusion, however, he quotes some passages from the opinion of Christancy, J., in Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661, which will bear repetition as suggestive of some of the reasons why the forgery of a promissory note should not be held to create a contract, which the party sought to be charged never consciously made himself or authorized anybody else to make in his behalf. Speaking of the alleged negligence in leaving spaces on the note, Mr. Justice Christancy said: "The negligence, if such it can be called, is of the same kind as might be claimed if any man in signing a contract were to place his name far enough below the instrument to permit another line to be written above his name

in apparent harmony with the rest of the instrument. * * * Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and, unless perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders."

While a general reference to the cases cited and reviewed by Chief Justice Gray in Greenfield Savings Bank v. Stowell, supra, will suffice, there are some later decisions to which attention may be called. In Knoxville Nat. Bank v. Clark, 51 Iowa, 264, 1 N. W. 491, 33 Am. Rep. 129, will be found a strong and well-reasoned opinion against holding a party to a note which has been fraudulently raised, after it left his hands, liable for negligence, because when he executed the instrument there were spaces left thereon (not being obvious blanks designed to be filled) which would permit of forgery. The trial court had rendered judgment against the maker for the amount of the note as raised from $10 to $110 on a finding of negligence in leaving a space before the word "ten" and the figures "10." "On this ground," said the Supreme Court of Iowa, "the court proceeded and the decision is based on the reasoning of the civil lawyers. But could it be anticipated that such negligence would cause another to commit a crime, and can it be said a person is negligent who does not anticipate and provide against the thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle, or is practicable, if he is required to protect and guard his business transactions so that he cannot be held liable for the criminal acts of another? If so, why should not the negligence of the owner of goods which are stolen excuse the bona fide purchaser?" And, referring to the argument that such a measure of liability is required to promote the free interchange of commercial paper (a view which seems to have been influential in the Pennsylvania case of Garrard v. Haddan), the court well said: "At the present day negotiable paper is not ordinarily freely received from unknown persons. Forgeries, however, are not confined to such. But the necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made and which it is proposed to fasten on him because some one has committed a forgery or other crime."

In Burrows v. Klunk, 70 Md. 451, 17 Atl. 378, 3 L. R. A. 576, 14 Am. St. Rep. 371, the Maryland Court of Appeals emphasizes the distinction between a note in blank as to the amount, when signed

and delivered to another for use, and a note complete on its face when signed and delivered, in which has been written the sum payable, the date, time of payment, and name of the payee. "In such case," it is held, "there can be no inference that the defendant authorized any one to increase the amount simply because blank spaces were left in which there was room enough to insert a larger sum."

No one questions the proposition that, where a party to commercial paper intrusts it to another with a blank thereon designed to be filled up with the amount, such party is liable to a bona fide holder of the instrument for the amount filled in, though it be larger than was stipulated with the person to whom immediate delivery was made. Van Duzer v. Howe, 21 N. Y. 531. So, also, a note executed with a blank therein for a statement of the place of payment is not avoided in the hands of a bona fide holder for value by the insertion in the blank of a place different from that agreed upon by the original parties. Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573. But, where there is no blank for that purpose when the note is indorsed, the insertion of an obligation to pay interest is a material alteration which invalidates the instrument as against the indorser. McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372. In the case last cited the note, when indorsed, ended with the word "at," followed by a space in which the maker, after indorsement, inserted a place of payment, adding the words "with interest"; but no suggestion appears to have been made that, because the space left was large enough to allow the insertion of these words, the indorser was negligent and could be charged with the amount of the note, including the interest, on that ground. On the contrary, as the law then stood, he was relieved of all liability whatever as the effect of the unauthorized alteration. Now, however, under the negotiable instruments law (Laws 1897, p. 745, c. 612, § 205) he would be liable on the paper according to its original tenor.

To sustain the judgment in the case at bar in view of the instructions under which the issues were submitted to the jury, we must hold that the indorser of a promissory note, the amount of which has been fraudulently raised after indorsement by means of a forgery, is liable upon the instrument in the hands of a bona fide holder for the increased amount, because of negligence in indorsing the same when there were spaces thereon which rendered the forgery easy, though the note was complete in form. To do this would be to create a contract through the agency of negligence; for the action is not in tort for damages, but upon the contract as expressed in the note. But, apart from any question as to the form in which the indorser is sought to be charged, I am of opinion that no liability on the part of the indorser for the amount of such a note as raised can be predicated simply upon the fact that such spaces existed thereon. This conclusion I base upon the authorities to that effect which I have already discussed, and upon

what seems to me to be considerations of sound reason independent of judicial authority.

An averment of negligence necessarily imports the existence of a duty. What duty to subsequent holders of a promissory note is imposed by the law upon a person who is requested to indorse the paper for the accommodation of the maker and who complies with such request? It is a complete instrument in all respects—as to date, name of payee, time and place of payment, and amount. There are, it is true, spaces on the face of the instrument in which it is possible to insert words and figures which will enlarge the amount and still leave the note apparently a genuine instrument; in other words, there is room for forgery. On what theory is the indorser negligent because he places his name on the paper without first seeing to it that these spaces are so occupied by cross-lines or otherwise as to render forgery less feasible? It can only be on the theory that he is bound to assume that those to whom he delivers the paper or into whose hands it may come will be likely to commit a crime if it is comparatively easy to do so. I deny that there is any such presumption in the law. It would be a stigma and reflection upon the character of the mercantile community and constitute an intolerable reproach of which they might well complain as without justification in practical experience or the conduct of business.

That there are miscreants who will forge commercial paper by raising the amount originally stated in the instrument is too true, and is evidenced by the cases in the law reports to which we have had occasion to refer; but that such misconduct is the rule, or is so general as to justify the presumption that it is to be expected and that business men must govern themselves accordingly, has never yet been asserted in this state, and I am not willing to sanction any such proposition either directly or by implication. On the contrary, the presumption is that men will do right rather than wrong. See Bradish v. Bliss, 35 Vt. 326. As was said by Judge Cullen in Critten v. Chemical Nat. Bank, 171 N. Y. 219, 224, 63 N. E. 969, 57 L. R. A. 529, it is not the law that the drawer of a check is bound so to prepare it that nobody else can successfully tamper with it. Neither is it the law that the indorser of a promissory note complete on its face may be made liable for the consequences of a forgery thereof simply because there were spaces thereon which rendered the forgery easier than would otherwise have been the case.

I think the judgment of the Appellate Division should be reversed and a new trial granted, with costs to abide the event.

CRUCHLEY v. CLARANCE.

(Court of King's Bench, 1813. 2 Maule & S. 90.)

This was an action against the defendant as drawer of a bill of exchange for £200. The declaration contained several counts, and in one stated the bill to have been made payable to the order of the plaintiff, and in another to the order of ——— (thereby meaning to the order of such person as the defendant should cause to be named and inserted in the said bill as payee), and then averred that the defendant caused the name of the plaintiff to be inserted, etc. At the trial before Lord Ellenborough, C. J., at the London sittings after last term, it appeared that the bill had been drawn by the defendant in Jamaica upon one Henry Man, of London, the defendant leaving a blank for the name of the payee, and had afterwards been negotiated in this country by one Vashon, who indorsed it to the plaintiff in payment of an old debt, and the plaintiff inserted his own name as the payee. A verdict was found for the plaintiff.

Denman moved to enter a nonsuit or for a new trial, on the ground that the plaintiff had no right to insert his name in the bill; and he said it was distinguishable from Russel v. Langstaffe, Doug. 513, because there the bill was filled up by one of the original parties.

Lord ELLENBOROUGH, C. J. As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant by leaving the blank undertook to be answerable for it when filled up in the shape of a bill.

LE BLANC, J. It is the same thing as if the defendant had made the bill payable to bearer.

BAYLEY, J. The issuing the bill in blank without the name of the payee was an authority to a bona fide holder to insert the name.

PER CURIAM. Rule refused.

BOSTON STEEL & IRON CO. v. STEUER.

(Supreme Judicial Court of Massachusetts, Suffolk. 1903. 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.)

Contract for $1,823.25 for work done and materials furnished for a building of the defendant numbered 811 on Beacon street in Boston. Writ dated April 11, 1899.

At the trial in the superior court before Bishop, J., without a jury, the judge excluded certain evidence offered by the defendant and refused to make certain rulings requested by the defendant. He found for the plaintiff in the sum of $2,043.86, and the defendant alleged exceptions.

LORING, J. The only question in issue between the parties in this case is the right of the defendant to be credited with two sums, of $200 and $400, respectively, under the following circumstances:

On December 31, 1898, the defendant's husband owed the plaintiff $1,781.30, for ironwork furnished by it to him in the construction of a house, No. 819 Beacon street. On being pressed for payment, the defendant's husband, on January 21, 1899, delivered to the plaintiff the defendant's check for $200, payable to the plaintiff. It is stated in the bill of exceptions that on February 2, 1899, "he paid the plaintiff the further sum of $400 in a check made by said Jennie D. Steuer." But it appears from the auditor's report, which was before the court and is referred to in the bill of exceptions, that the plaintiff's manager's name was Newcomb, and that his story was that the check for $400 "was brought to him at his office on Devonshire street by Mr. Steuer in response to further demands for money, and that it was made out in blank and filled up by himself, Mr. Steuer being unwilling that it should be made for more than $200, while Mr. Newcomb insisted that it should be for the larger amount, and so made it, with Mr. Steuer's consent, and applied it to his debt." The defendant's story was "that she gave the check to Mr. Newcomb at her house."

In addition to the iron furnished the defendant's husband for 819 Beacon street, the defendant's husband had ordered two iron columns and a base plate from the plaintiff for another house, No. 811 Beacon street, which the plaintiff supposed was Steuer's until his manager was told on March 10th that it belonged to defendant's wife. These two columns and base plate were delivered on December 22, 1898, and at the rate charged in the bill of items were worth $150.35. From December to March there were negotiations between the defendant's husband and the plaintiff for a contract by which all the ironwork for 811 Beacon street should be furnished by the plaintiff for a fixed sum, payments on account to be made as each floor was finished; and on or about March 1, 1899, the plaintiff's manager submitted to the defendant a written contract to this effect. On March 10th this was returned by the defendant's husband with the statement already referred to, that 811 Beacon street belonged to his wife, and that the contract should be made with her. No written contract was ever made between the plaintiff and the defendant, but the plaintiff went forward and delivered the ironwork for two of the six stories of the house, part being delivered before March 10th and part after that date. The last was delivered on March 18th, when the plaintiff stopped because it had not been paid for what it had done. Thereupon this action was brought to recover the reasonable value of the materials furnished and work done.

At the trial the defendant contended "that the amount of said payments should be credited to her in this action, on the ground that they were payments required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that the checks were given to her said husband, as her agent, to make such pay-

ments," and "offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him, and claimed that the same should be admitted in evidence. The court declined to admit the same, and the defendant duly excepted to the exclusion." The other exceptions taken at the trial have been waived, and the question raised by this exception is the only matter now before us.

The plaintiff has argued that it did not appear but that these instructions were given in a private conversation between husband and wife. But on a fair construction of the bill of exceptions we do not think that the evidence can be taken to have been excluded on that ground. It is stated there that the "defendant offered evidence of her instructions to her husband as to the use and application of said checks, not made in the presence of the plaintiff or anyone representing him." This must be taken to be a statement of the ground of the objection, and the ruling must be taken to be a ruling that competent evidence was offered and was excluded because not made in the presence of the plaintiff or of some one representing it.

The judge before whom the case was tried without a jury found "that neither of said payments was required by the plaintiff to be made in advance on account of her said building numbered 811 Beacon street, and that neither of them was made according to any agreement for payment to be made on account of said 811 Beacon street, and that no floor in said building was completed at the time either of said payments was made, and that said payments were made by said Bernard Steuer on account of his building numbered 819 Beacon street, and were received by the plaintiff on account therefor."

This finding makes the evidence excluded immaterial so far as the check for $200 is concerned. If this evidence had been admitted, the defendant's case on the $200 check would have been this: A check payable to the plaintiff is handed by the drawer to her husband, to be delivered by him to the plaintiff in payment of a debt to become due from the drawer of the check to the payee, and is fraudulently handed by the husband to the payee of the check, in payment of a debt due from him to the payee, and is accepted by the payee in good faith in payment of that debt.

In such a case the payee of the check is a bona fide purchaser of the check for value, without notice, and the drawer could not set up her husband's fraud in defense of the check, nor maintain an action for money had and received after payment of it on discovering the fraud.

The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a bona fide purchaser of it at common law, with all the rights incident to a purchaser for value thereof without notice. That was decided in Watson v. Russell, 3 B. & S. 34, and affirmed in the Exchequer Chamber in the same case, 5 B. & S. 968. To the same effect is Poirier v. Morris, 2 El. & Bl. 89, and Nelson v. Cowing, 6 Hill (N. Y.) 336, 339. Munroe v. Bordier, 8 C. B. 862, and

Armstrong v. American Exchange Bank, 133 U. S. 433, 453, 10 Sup. Ct. 450, 33 L. Ed. 747, seem to go on this ground. The case of Fairbanks v. Snow, 145 Mass. 153, 13 N. E. 596, 1 Am. St. Rep. 446, might have been decided on this ground, but was disposed of on common-law principles.

That payment of the pre-existing debt makes the holder a purchaser for value in this commonwealth was settled law before the negotiable instruments act was enacted. Blanchard v. Stevens, 3 Cush. 162, 50 Am. Dec. 723; Stoddard v. Kimball, 6 Cush. 469; Goodwin v. Massachusetts Loan & Trust Co., 152 Mass. 189, 199, 25 N. E. 100; National Revere Bank v. Morse, 163 Mass. 383, 40 N. E. 180; Holden v. Phœnix Rattan Co., 168 Mass. 570, 47 N. E. 241.

The checks in question in the case at bar were given after the negotiable instruments act (St. 1898, c. 533; Rev. Laws, c. 73) went into effect, and are governed by its provisions. The plaintiff is a holder in due course of the $200 check, within Rev. Laws, c. 73, § 69. This section is taken from section 29 of the English bills of exchange act of 1882, and Watson v. Russell is cited in Chalmers, Bills of Exchange (5th Ed.) 89, as an example of a person who is a holder in due course within that section. It was stated by Lord Russell in Lewis v. Clay, 67 L. J. Q. B. (N. S.) 224, that a payee of a promissory note cannot be a holder in due course within section 29 of the English bills of exchange act of 1882. In Hardman v. Wheeler, [1902] 1 K. B. 361, 372, it was pointed out that this statement of Lord Russell was obiter, and it was also pointed out that in Herdman v. Wheeler, as in Lewis v. Clay, it was not necessary to pass on that point. The case of Watson v. Russell, 3 B. & S. 34; S. C. 5 B. & S. 968, does not seem to have been brought to the attention of the court in either of these cases. And in neither case does the court seem to have taken into consideration the practice of a check being procured drawn by another to be used in paying a debt due from the person procuring the check to the person to whom the debtor has had the check made payable. The practice is recognized in the case of foreign bills of exchange, and the person procuring the bill is known technically as the "remitter" of it. See Munroe v. Bordier, 8 C. B. 862, where it was held that the payee of a foreign bill, who took it from the remitter of it for value, was a bona fide purchaser for value. It was this practice which was applied in Watson v. Russell, 3 B. & S. 34, in case of a check. In our opinion, a check received by the payee named in it, in payment of a debt due from the remitter of the check, is received by a holder in due course within section 69 of the negotiable instruments act (St. 1898, c. 533; Rev. Laws, c. 73), and that is so even if we should follow the decision made in Hardman v. Wheeler, [1902] 1 K. B. 361, and hold that a payee never can be a holder in due course to whom the bill has been "negotiated," within the last clause of section 31 of our act (Rev. Laws, c. 73), which is taken from section 20 of the English bills of exchange act of 1882 (45 & 46 Vict. c. 61). The rule that payment of a pre-existing debt

makes the holder a holder for value was adopted in Rev. Laws, c. 73, § 42.

But so far as the check for $400 is concerned, we are of opinion that the evidence should have been admitted. If the defendant's story were found to be true, namely, that she handed the check to the plaintiff's manager at her house, this check would stand on the same footing as the other. But the story of the plaintiff's manager was that the check was brought to him by the defendant's husband, signed in blank by the defendant, and that it was filled up by him for the sum of $400, with the husband's consent. We assume, in favor of the plaintiff, that this is to be interpreted to mean that the only blank in the check, when it was brought to the plaintiff's manager by the defendant's husband, was in the amount for which it was to be drawn.

It had been held in England, before the bills of exchange act in 1882, that such a piece of paper is not a check; that one who buys it buys an incomplete instrument and his rights depend upon the real authority which the signer had in fact given in the matter. Awde v. Dixon, 6 Exch. 869. See, also, Hatch v. Searles, 2 Sm. & G. 147; Hogarth v. Latham, 3 Q. B. D. 643; Watkin v. Lamb, 85 L. T. (N. S.) 483; France v. Clark, 26 Ch. D. 257, 262. And see Ledwich v. McKim, 5? N. Y. 307. Such an incomplete instrument is prima facie authority to fill in the blank. Crutchly v. Mann, 5 Taunt. 529; Swan v. North British Australasian Co., 2 H. & C. 175, 184. But this prima facie authority, as we have said, may be met by evidence of what authority was in fact given, as was done in Awde v. Dixon, 6 Exch. 869. If the blanks are filled up before the instrument is negotiated, it does not lie in the maker's mouth to set up that it was incomplete when delivered by him. In such a case, a plaintiff who buys for value without notice gets the rights of a bona fide purchaser for value of a negotiable instrument; and the fact that there was no authority for filling up the blanks as they were filled up, or the fact that the paper was otherwise wrongfully dealt with, is no defense. Schultz v. Astley, 2 Bing. N. C. 544; Foster v. Mackinnon, L. R. 4 C. P. 704, 712.

In this commonwealth it was held, on the other hand, that a note with a blank for the payee's name was a promissory note, and not an incomplete paper, which might be made into a promissory note. Ives v. Farmers' Bank, 2 Allen, 236. And in Frank v. Lilienfeld, 33 Grat. (Va.) 377, it was held that the purchaser in good faith of a note in printed form, indorsed by the defendant, where the date, payee's name, and amount had been left blank, had an absolute right to fill in the amount advanced thereon and to fill up the other blanks. It also has been held here, as it has been held in England, that such a blank, in the absence of other evidence, might be filled in by a bona fide purchaser (see Androscoggin Bank v. Kimball, 10 Cush. 373); and that a bona fide purchaser of such a paper, which is filled before it is negotiated, has the rights of a purchaser for value without notice (see Whitmore v. Nickerson, 125 Mass. 496, 28 Am. Rep. 257; Binney v. Globe

National Bank, 150 Mass. 574, 23 N. E. 380, 6 L. R. A. 379). See, also, in this connection, Herdman v. Wheeler, [1902] 1 K. B. 361.

It is not necessary to consider how a blank check would be dealt with in Massachusetts at common law, where the amount in place of the name or date is lacking. The negotiable instruments act (Rev. Laws, c. 73, § 31) adopted the English law on this point, and it follows that, if Newcomb's story is to be believed, the blank check brought to him must be treated as an incomplete instrument and not as a check.

The defendant further contends that it was inadmissible to show the real authority given to the husband in the absence of the plaintiff, and cites in support of that contention Markey v. Mutual Benefit Ins. Co., 103 Mass. 78, 93, and Byrne v. Massasoit Packing Co., 137 Mass. 313. These are cases where the act done was within the ostensible scope of the authority given an agent, and for that reason the real authority could not be invoked. The only act relied on as giving ostensible authority to the husband in the case at bar was putting him in possession of the blank check. There was no more ostensible authority here than there was in Awde v. Dixon, 6 Exch. 869, Hogarth v. Latham, 3 Q. B. D. 643, or Watkin v. Lamb, 85 L. T. (N. S.) 483. An incomplete check gives an authority to fill it up which is only a prima facie authority. It does not import an ostensible authority to fill it up, which is absolute.

The plaintiff's rights under the blank check for $400, and to the money received for it, depend upon the authority actually given by the defendant when she signed it, and the evidence offered should have been admitted in respect of the credit claimed for the $400 paid under the blank check.

The entry must be: Exceptions sustained.

BAXENDALE v. BENNETT.

(Court of Appeal, 1878. 3 Q. B. D. 525.)

Action commenced on the 10th July, 1876, on a bill of exchange, dated the 11th of March, 1872, for £50. drawn by W. Cartwright and accepted by the defendant, and of which the plaintiff was the holder, and for interest. At the trial before Lopes, J., without a jury, at the Hilary sittings in Middlesex, the following facts were proved:

The bill, dated the 11th of March, 1872, on which the action was brought, purported to be drawn by one W. Cartwright on the defendant, payable to order at three months' date. It was indorsed in blank by Cartwright, and also by one H. T. Cameron. The plaintiff received the bill from Cameron on the 3d of June, 1872, and was the bona fide holder of it, without notice of fraud, and for a valuable consideration.

One J. F. Holmes had asked the defendant for his acceptance to an accommodation bill, and the defendant had written his name across a paper which had an impressed bill stamp on it, and had given it to

Holmes to fill in his name, and then to use it for the purpose of raising money on it. Afterwards Holmes, not requiring accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant then put it into a drawer, which was not locked, of his writing table at his chambers, to which his clerk, laundress, and other persons coming there had access. He had never authorized Cartwright or any person to fill up the paper with a drawer's name, and he believed that it must have been stolen from his chambers.

On these facts the learned judge found that the bill was stolen from the defendant's chambers, and the name of the drawer afterwards added without the defendant's authority; but that the defendant had so negligently dealt with the acceptance as to have facilitated the theft. He therefore ruled, upon the authority of Young v. Grote, 4 Bing. 253, and Ingham v. Primrose, 7 C. B. (N. S.) 82; 28 L. J. C. P. 294, that the defendant was liable, and directed judgment to be entered for the plaintiff for £50. and costs.[4]

Bramwell, L. J. I am of opinion that this judgment cannot be supported. The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and, if he is to be held liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a bona fide holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person, telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name bona fide put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not; but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped?

[4] The arguments of counsel and parts of the opinions are omitted.

What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank check, with no payee, or date, or amount, and it was stolen; would he be liable or accountable, not merely to his banker the drawee but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a check or bill to the signature; would the signer be liable? I cannot think so. But what about the authorities? It must be admitted that the cases of Young v. Grote, 4 Bing. 253, and Ingham v. Primrose, 7 C. B. (N. S.) 82, 28 L. J. C. P. 294, go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument. It has not been got from him by the commission of a crime. This, undoubtedly, is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime.

But it is said that he has done so through negligence. I confess I think he has been negligent; that is to say, I think, if he had had this paper from a third person, as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. * * *

Brett, L. J. In this case I agree with the conclusion at which my Brother Bramwell has arrived, but not with his reasons. The defendant signed a blank acceptance and gave it to a person who wanted money that he might get it discounted; that person sent the blank acceptance back to the defendant, who put it into a drawer in his room; the room was not a place of general resort, and the drawer into which the acceptance was put was left unlocked; somebody, not a servant of the defendant, stole it, and it was filled up by a different person from him to whom the acceptance was originally given and who had returned it. On these facts, Lopes, J., held that the defendant had been guilty of negligence, and was therefore liable on the bill to the plaintiff.

Bramwell, L. J., says that the defendant is not liable because, if he be guilty of negligence, the negligence is not the proximate or effective cause of the fraud. It seems to me that the defendant never authorized the bill to be filled in with a drawer's name, and he cannot be sued on it. I do not think it right to say that the defendant was negligent. The law as to the liability of a person who accepts a bill in blank is that he gives an apparent authority to the person to whom he issues it to fill it up to the amount that the stamp will cover. He does not strictly authorize him, but enables him to fill it up to a greater amount than was intended. Where a man has signed a blank acceptance, and has issued it, and has authorized the holder to fill it up, he is

Sec. 15 + 16 — N. I. L.

liable on the bill, whatever the amount may be, though he has given secret instructions to the holder as to the amount for which he shall fill it up. He has enabled his agent to deceive an innocent party, and he is liable. Sometimes it is said that the acceptor of such a bill is liable because bills of exchange are negotiable instruments, current in like manner as if they were gold or bank notes; but whether the acceptor of a blank bill is liable on it depends upon his having issued the acceptance intending it to be used. No case has been decided where the acceptor has been held liable if the instrument has not been delivered by the acceptor to another person.

In this case it is true that the defendant, after writing his name across the stamped paper, sent it to another person to be used. When he sent it to that person, if he had filled it in to any amount that the stamp would cover, the defendant would be liable, because he sent it with the intention that it should be acted upon; but it was sent back to the defendant, and he was then in the same condition as if he had never issued the acceptance. The case is this: The defendant accepts a bill and puts it into his drawer; it is as if he had never issued it with the intention that it should be filled up; it is as if after having accepted the bill he had left it in his room for a moment and a thief came in and stole it. He has never intended that the bill should be filled up by anybody, and no person was his agent to fill it up.

Then it has been said that the defendant is liable because he has been negligent; but was the defendant negligent? As observed by Blackburn, J., in Swan v. North British Australasian Company, 2 H. & C. 175, 32 L. J. (Ex.) 273, there must be the neglect of some duty owing to some person. Here how can the defendant be negligent who owes no duty to anybody? Against whom was the defendant negligent, and to whom did he owe a duty? He put the bill into a drawer in his own room. To say that was a want of due care is impossible. It was not negligence for two reasons: First, he did not owe any duty to any one; and, secondly, he did not act otherwise than in a way which an ordinary careful man would act. * * *

BAGGALLAY, L. J., concurred that the judgment ought to be entered for the defendant. Judgment for defendant.

II. Personal Defenses [5]

CLARK v. PEASE.

(Supreme Judicial Court of New Hampshire, 1860. 41 N. H. 414.)

This case is reported on page 152, supra.

[5] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 108–115.

STARR v. STARR.

(Supreme Court of Ohio, 1858. 9 Ohio St. 74.)

Error to the court of common pleas of Athens county. Reversed in the district court.

On the 8th day of October, 1857, the plaintiff filed in the court of common pleas of Athens county her petition against the defendant, stating that Philip M. Starr, in his lifetime, made and delivered to plaintiff his certain promissory note in writing for the payment, to plaintiff or bearer, of $5,000 on demand; that said Philip M. Starr, after the delivery of the note, departed this life, leaving it unpaid; and that demand had been made of the defendant, as his executor, for the allowance or payment of the note, and that he refused to do either. Whereupon judgment is asked for the amount of the note and interest.

To this petition the defendant answered: (1) That his said testator, Philip M. Starr, never made the note in the petition mentioned, and never assumed and promised as therein stated. (2) That, if said testator did make said note, the same was made without any consideration, or value whatever, moving from the plaintiff to said testator.

At the May term, 1858, of said court, the cause was submitted to the court, and the court found "that the said promissory note was executed and delivered by the said testator, as the said plaintiff hath in her said petition averred. And the court further find that the said note was given by the said testator a short time before his death to the said plaintiff, who was the daughter of said testator, as an advancement and gift by the said testator to the said plaintiff, and as some provision for her out of his said estate, and without any other or different consideration whatever. And the court, being of opinion that, by law, natural love and affection, and a desire on the part of the testator to provide for and advance the said plaintiff, are not a good and sufficient consideration to enable the plaintiff to recover on said note, do find that said note was without consideration, as said defendant hath in his said answer averred." Thereupon judgment was rendered against the plaintiff for costs, and she excepted to the ruling and judgment. To reverse this judgment, the plaintiff filed a petition in error in the district court, insisting that the court of common pleas erred: (1) In ruling "that, by law, natural love and affection, and a desire on the part of the testator to provide for and advance the said plaintiff, are not a good and sufficient consideration to enable the said plaintiff to recover on said note." (2) In finding that the note was without consideration. (3) In rendering judgment against the plaintiff, when it should have been for her.

The questions thus presented were reserved in the district court for decision by the supreme court.

PER CURIAM. The judgment of the court of common pleas must be affirmed, upon the principles settled in the case of Hamor v. Moore's Adm'rs, 8 Ohio St. 239.

The note in the case before the court was a gift, and its delivery was the delivery of a promise only, and not of the thing promised. The promise being unfulfilled at the death of the maker of the note, the gift failed. And as the promise was without consideration, and could not have been enforced against the maker in his lifetime, it cannot be against his executor.

Judgment affirmed.

MILLER v. FINLEY.

(Supreme Court of Michigan. 1872. 26 Mich. 249, 12 Am. Rep. 306.)

CAMPBELL, J.[6] Miller sued below upon a joint and several promissory note. Both defendants pleaded the general issue, and Hugh Finley, jr., appended to his plea an affidavit denying the execution of the note by himself. No notice of any kind was filed or served with the plea.

Upon the trial the defense was rested upon several grounds. It was claimed that Hugh Finley, sr., signed the note without the consent of Hugh Finley, jr., his son, who, it was alleged, refused to assent to having him sign, and after the note had been delivered as the sole note of the son. It was further claimed that when he signed it he was in such a state of drunkenness, procured by the original payee, that he was not responsible for his acts. It was also set up that the note was one of several obtained by fraud, as the price of a worthless patent, for a horse-collar fastener.

Miller claimed as a bona fide holder. Judgment was rendered for defendants below, and he now brings error. * * *

The testimony of defendants tended to prove that the elder Finley knew nothing of the trade, and was drunk when he signed the note, and that the payee had wholly, or in part, procured it. The testimony for plaintiff tended to show that the old man was fully aware of the transaction between his son and the payee, and took some part in it. The evidence of the son does not indicate any extreme intoxication on the part of the father. His own testimony goes further. He seems, however, to have recollected the signing, and its genuineness is not in issue. There is no question in the case as to the identity of the paper. The note he signed was the one the son supposed he was signing, and there was no substitution of one paper for another. The defense rests upon the ground of fraud, and not of illegality, and while, if the old man's story is true, the note would be voidable as against the payee, it would not be a nullity as to all persons.

[6] A portion of the opinion is omitted.

There is nothing on the face of the paper to cast suspicion upon its character, and it can only be impeached, in the hands of a holder for value, by evidence that he took it under circumstances which rendered him guilty of bad faith. Goodman v. Simonds, 20 How. 343, 15 L. Ed. 934; Murray v. Lardner, 2 Wall. 110, 17 L. Ed. 857; Goodman v. Harvey, 4 Ad. & El. 870; Uther v. Rich, 10 Ad. & El. 784; 2 Parsons on Bills, 280; Redfield & Bigelow's Leading Cases on Bills and Notes, 239, 257.

The proof must show that the holder for value, who takes a note with no earmarks of fraud or illegality, has had notice of such a nature that he could not honestly take the paper without further inquiry. The facts, of which he must have either knowledge or notice, must be such as go to the defects of title. The defects set up here were the fraud alleged to have been practiced on the elder Finley, by taking advantage of his drunkenness, and the cheat, if there was any, whereby the younger Finley was induced to purchase the patent. The latter we have intimated was not properly in the case. But, if it had been admissible, it would, perhaps, be of no special importance, as presented by the record as it stands. We have found nothing in the testimony tending to show that Miller had heard or known anything about either of these defenses. * * *

Judgment reversed.

III. Discharge [7]

BURBRIDGE v. MANNERS.

(Nisi Prius, 1812. 3 Camp. 193.)

This was an action on a promissory note for £101. 15s. 5d. dated 11th October, 1810, drawn by J. Finney, payable three months after date at Fraser & Co.'s to the defendant, indorsed by him to one Tinson and by Tinson to the plaintiff.

The note was regularly presented for payment in the forenoon of the day it became due, when payment was refused; and in the afternoon of the same day the plaintiff caused notice of its dishonor to be sent to the defendant.

Park, for the defendant, objected that this was not sufficient notice of the dishonor. Finney, the maker of the note, had the whole of the day it became due to pay it, and till the last minute of that day it could not be considered as dishonored. The notice therefore stated what was untrue, and was evidently premature.

Lord ELLENBOROUGH. I think the note was dishonored as soon as the maker had refused payment on the day when it became due, and

[7] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 116–121.

the notice sent to the defendant must have answered all the purposes for which notice in such cases is required. The holder of a bill or note gives notice of its dishonor in reasonable time the day after it is due; but he may give such notice as soon as it has been dishonored the day it becomes due, and the other party cannot complain of the extraordinary diligence used to give him information.

By the defendant's evidence it appeared that this bill, being in the hands of Maude & Co., was paid in by them when indorsed only by the defendant to their bankers, Masterman & Co., who were to present it for payment. Maude & Co. had received it from Finney, the maker, as a collateral security for an acceptance of his, then in their hands overdue. On the 10th of January, four days before the note was due, some person unknown came to Masterman & Co.'s, where it lay, paid it, and carried it away without its being canceled, or any memorandum being made upon it. However, it had been indorsed by Tinson, and had come into the hands of the plaintiff, before it was due.

Park contended that after the bill had been once paid, it could not be reissued, and he relied upon Beck v. Robley, 1 H. Bl. 89, note.

Lord ELLENBOROUGH. Payment means payment in due course, and not by anticipation. Had the bill been due before it came into the plaintiff's hands, he must have taken it with all its infirmities. In that case it would have been his business to inquire minutely into its origin and history. But receiving it before it was due, there was nothing to awaken his suspicion. I agree that a bill paid at maturity cannot be reissued, and that no action can afterwards be maintained upon it by a subsequent indorsee. A payment before it becomes due, however, I think does not extinguish it any more than if it were merely discounted. A contrary doctrine would add a new clog to the circulation of bills of exchange and promissory notes; for it would be impossible to know whether there had not been an anticipated payment of them. It is the duty of bankers to make some memorandum on bills and notes which have been paid; but if they do not, the holders of such securities cannot be affected by any payment made before they are due. While a bill of exchange is running, it remains in a negotiable state. I cannot limit its negotiability the last four days before it becomes due more than the first four days after it is drawn.

Verdict for the plaintiff.

SCHWARTZMAN v. POST et al.

(Supreme Court, Appellate Division, First Department, New York, 1903. 94 App. Div. 474, 84 N. Y. Supp. 922, 87 N. Y. Supp. 872.)

Appeal by the plaintiff, Abraham Schwartzman, from an order of the Appellate Term of the Supreme Court, entered in the office of the clerk of the county of New York on the 16th day of November, 1903, which order reversed a judgment of the City Court of the city of New

York in favor of the plaintiff entered in the office of the clerk of said court on the 15th day of February, 1903, upon the verdict of a jury, and also (as stated in the notice of appeal) from a judgment of reversal entered in the office of the clerk of the city of New York on the 13th day of January, 1904, upon said order of the Appellate Term.

PER CURIAM. Determination of Appellate Term affirmed, with costs, on the opinion of the court below, and judgment absolute ordered for defendant, with costs.

VAN BRUNT, P. J., and PATTERSON, INGRAHAM, and MCLAUGHLIN, JJ., concur.

LAUGHLIN, J. (dissenting). According to the testimony of the plaintiff, the note was not paid, nor was it surrendered up to the defendant Post upon the understanding that it was to be deemed paid, but on the distinct agreement that the defendants were to remain liable for the balance for which plaintiff has recovered in this action. The defendants did not, therefore, in my opinion, by this surrender become holders of the note in their "own right," within the intent and meaning of subdivision 5 of section 200 of the negotiable instruments law, Laws 1897, p. 744, c. 612, and the transaction did not constitute a discharge of the note. The defendant Post merely became the bailee thereof for the payee.

The following is a part of the opinion delivered by Freedman, P. J., in the court below:

This action was brought to recover an alleged balance of $1,750, claimed to be due upon a demand note for $5,000, dated May 1, 1899, payable to the order of the maker, the defendant Post, and indorsed by him and his father, the defendant Postawalsky. Postawalsky was not served with the summons and did not appear. After a trial by a jury, a verdict for the amount claimed was rendered in favor of the plaintiff. The plaintiff's complaint originally averred that he is "now the lawful owner and holder" of the note in suit, but it was subsequently amended by striking out the allegation that plaintiff was the "holder." The answer denied the delivery of the note to the plaintiff, and that he was the owner thereof, and set up, among other defenses, that the note had been delivered up and surrendered to Post, the maker, about April 9, 1900, and that defendant had ever since been the holder thereof.

At the beginning of the trial, the note, in pursuance of a notice given by plaintiff's attorney, was produced by the defendant Post, and by plaintiff's attorney offered and received in evidence. The testimony of the transaction out of which the cause of action arose, as given by the parties, is very conflicting, and a reading of the record convinces one that neither party has given a complete statement of the facts. The plaintiff's version, however, was accepted and believed by the jury, and must, therefore, for the purposes of this appeal, be taken as true, and, briefly stated, is as follows:

In 1898 plaintiff and the defendant Postawalsky were copartners in the cloak business. This partnership was dissolved by mutual consent in 1899, and plaintiff received the note in question for his interest in said business. Subsequently, upon demanding payment of the note of the defendant, Post told the plaintiff that he (Post) could not pay the full amount of the note, but would pay $2,000 if the plaintiff would give up the note. This offer was afterwards increased by Post to the sum of $2,500. Plaintiff then authorized his brother (Schwartz) to continue the negotiations with Post. For some reason, not appearing, the plaintiff had placed the note with one Kohn, who testifies that he also called upon Post in regard to obtaining payment of the note, and that Post refused to pay in full. Plaintiff's brother (Schwartz) testifies to similar conversations with Post. In all of the conversations Post is alleged to have said, in substance, that, unless the amount offered was accepted by the plaintiff, and the note given up, that he, Post, would "protect" himself; that "I have been through the mill once before, and know how to take care of myself." These witnesses also testify that Post promised to pay the balance of his indebtedness, but insisted upon the surrender of the note to him. Matters between the parties culminated in a meeting of Post, Kohn, one Kohler, attorney for Post, one Essberg, attorney for plaintiff or his brother, Schwartz, and Schwartz, at Essberg's office, at which time Post paid $2,750 and Essberg $500 to Schwartz, who then gave the note to Essberg. The $3,250 was then paid plaintiff, and the note eventually given to Post, although when Post came into possession of the note does not appear, nor is it shown for what reason Essberg contributed the sum of $500 towards the amount paid the plaintiff.

At the close of the plaintiff's case, and again at the close of the whole case, the defendant's attorney moved to dismiss the complaint upon the ground that "the plaintiff has failed to establish a cause of action, and upon the ground that by his own admission of the delivery and surrender of the note by him to the defendant [the plaintiff] extinguished any liability on the note. * * * My contention is that the delivery of that note by the plaintiff to the defendant constituted a discharge and cancellation of that note."

I am of the opinion that the defendant Post is right in this contention. The cause of action is based wholly upon the note. Subdivision 5 of section 200 of the Negotiable Instruments Law (Laws 1897, p. 744, c. 612) provides that a negotiable instrument is discharged "when the principal debtor becomes the holder of the instrument at or after maturity in his own right." The instrument in question was a negotiable note. The term "holder" is defined in section 2, p. 720, as follows "'Holder' means the payee or indorsee of a bill or note who is in the possession of it, or the bearer thereof." And section 3 contains the following definition: "Person Primarily Liable on Instrument.—

The person 'primarily' liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same."

The words of subdivision 5 of section 200, "in his own right," merely exclude such a case as that of a maker acquiring the instrument in purely a representative capacity. The case at bar comes exactly within these provisions. Post was the maker of the note, and primarily liable thereon. It was surrendered to him, and he became the "holder" thereof without fraud or mistake, in "his own right." Prior to the adoption of the negotiable instruments law it has been held that, if a note be surrendered by the payee to the maker, the whole claim is discharged. Jaffray v. Davis, 124 N. Y. 164–170, 26 N. E. 351, 11 L. R. A. 710; Ellsworth v. Fogg, 35 Vt. 355; Kent v. Reynolds, 8 Hun, 559; Beach v. Endress, 51 Barb. 570, affirmed in Larkin v. Hardenbrook, 90 N. Y. 333, 43 Am. Rep. 176.

Whether the plaintiff can maintain an action upon the original indebtedness, or upon the defendant Post's promise to pay the balance due, the consideration therefor being the plaintiff's surrender of the note, need not now be determined. * * *

BLENN v. LYFORD.

(Supreme Judicial Court of Maine, 1879. 70 Me. 149.)

Assumpsit by indorsee against the maker of a promissory note.

After the note was read in evidence, the defendant offered the receipt following, signed by M. E. Rice, the payee, which was excluded: "Received of H. H. Lyford two notes of hand, dated in December last, for three hundred dollars each, one payable in six months from date, the other seven months from date. These notes are for my benefit, except for his note due me April 15, 1872, for $225. The balance of the two above-named $300 notes I am to pay."

Joseph H. Richardson, called by the defendant, testified in substance that he bought the note in suit of M. E. Rice in the fore part of April, 1872; that it had about four months to run; that it then had on the back the words, "Holden without demand or notice, M. E. Rice," now erased; that he kept it two or three months after it became due. On being asked whether M. E. Rice then paid it and took it up, the answer, on objection of the plaintiff, was excluded.

Various other questions to similar purports, and other testimony tending to show equitable defenses, was excluded on objection.

By consent of parties, the case was withdrawn from the jury and reported to the law court. If the foregoing rulings were wrong, and if the evidence excluded was admissible and would constitute a valid defense against this plaintiff, the case is to stand for trial; if inad-

missible, or insufficient to constitute such defense, a default is to be entered for the amount of the note, with interest since due.

The remaining material facts sufficiently appear in the opinion.[8]

APPLETON, C. J. This is an action of assumpsit on the following note: "St. Albans, Me., Dec. 2, 1871.

"Seven months from date, value received, I promise to pay M. E. Rice, or order, three hundred dollars, at any bank in Bangor.

"H. H. Lyford."

The note was indorsed in blank: "M. E. Rice." The following words were also on the back of the note, erased with ink, but legible: "Holden without demand or notice. M. E. Rice."

Granting the presumption that the plaintiff is a bona fide holder for value of the note before maturity, that presumption may be overcome by proof.

It appears from the testimony that the note was indorsed to one Richardson, for value, in the April following its date, that it was not paid at maturity, and that about three months after its dishonor he delivered it to Rice, the payee.

The plaintiff then received the note in suit, when overdue. The note, remaining unpaid after maturity, was dishonored, and it was the duty of the indorsee to make inquiries concerning it. If he takes it, though he gave a full consideration for it, he does so on the credit of the indorser. He holds the note subject to all equities with which it may be incumbered.

As the plaintiff is the indorsee of a dishonored note, it was competent for the defendant to show that it was an accommodation note, and that it had been paid by the party for whose accommodation it was given.

That the note was for the accommodation of the payee is abundantly shown by his receipt of the date of February 22, 1872, as well as by the testimony offered and excluded.

The note being for the accommodation of Rice, it was his duty to pay it. The note being found after dishonor in the hands of the one bound to pay it, the presumption is that he paid it. 2 Par. N. & B. 220. It was competent to show that in fact he paid it, but the answer to an inquiry whether the note was paid by Rice was excluded. This was erroneous.

Assuming the note to have been paid by Rice, it was the same as if paid by the maker. It was paid by the party whose duty it was to pay it. The purpose for which it was given has been accomplished. The negotiability of a note ceases after its payment by the party who should rightfully pay it. "Now it cannot be denied," says Denman, C. J., in Lazarus v. Cowie, 43 E. C. L. 819, "that if a bill be paid when due by the person ultimately liable on it, it has done its work, and is no longer a negotiable instrument. * * * But the drawer of an ac-

[8] The arguments of counsel are omitted.

commodation bill is in the same situation as the acceptor of a bill for value. He is the person ultimately liable, and his payment discharges the bill altogether."

Rice, when he took up the note in suit, had no right of action against the maker, and could not transfer to the plaintiff any better right after maturity than he had. Edw. B. & N. 564; Fish v. French, 15 Gray (Mass.) 520; Tucker v. Smith, 4 Greenl. (Me.) 415.

In the cases cited by the plaintiff there are most important differences from the one under consideration. In Bank v. Crow, 60 N. Y. 85, the plaintiffs were the indorsees of the note for value and before maturity, and were consequently to be protected. In Thompson v. Shepherd, 12 Metc. (Mass.) 311, 46 Am. Dec. 676, it was held that the indorsee of a note, who receives it for value from the second indorser, after it has been dishonored by the maker, can recover thereon against the maker, although he knew when he received it that as between the maker and first indorser it was an accommodation note. But this is upon the principle affirmed by the court in Woodman v. Churchill, 52 Me. 58, that where the first indorsee of a promissory note acquires a right of action against the maker, by being a bona fide purchaser, without notice and before maturity, he can transfer a good title as well after as before the note becomes due.

Exceptions sustained.

PRICE v. SHARP.

(Supreme Court of North Carolina, 1842. 24 N. C. 417.)

RUFFIN, C. J.[9] This is an action of assumpsit on two bills of exchange by the plaintiff as an indorser of Peebles, Hall & Co. against the acceptor. The bills were drawn on the 10th of July, 1841, by Peebles, Hall & Co., of Petersburg, in Virginia, in favor of F. E. Rives, on the defendant Sharp, of Danville, in Virginia, who accepted them, but failed to pay them when they fell due. The one was for $783.85 at 90 days, and the other for $787.71 at 4 months, from date. Upon the failure of Sharp, the payee, Rives, returned the bills to the drawers, Peebles, Hall & Co. for payment; and they accordingly paid him and took up the bills. On the 10th of December, 1841, Peebles, Hall & Co. indorsed the bills to the present plaintiff, who resides in Caswell, in this state, and immediately commenced this action by original attachment, levied on the estate of the defendant, situate in Caswell. The indorsement from Peebles, Hall & Co. to the plaintiff was without consideration, and was made for the purpose of enabling Price to take out an attachment in his name for the benefit of Peebles, Hall & Co., and the present action was accordingly brought for their use. Upon the return of the attachment the defendant gave bail, and appeared and

[9] The statement of facts is omitted.

pleaded, first, non assumpsit, and, secondly, by way of special plea in bar, the facts stated respecting the indorsement and the purpose of it. Upon the trial the facts were agreed upon as here stated, and upon them his honor was of opinion for the plaintiff, and so instructed the jury, who found a verdict accordingly, and from the judgment the defendant appealed.

For the defendant it has been insisted that the plaintiff cannot maintain this action, commenced by original attachment, because it is not brought for his own benefit, but, in evasion and fraud of the act of 1777, for that of Peebles, Hall & Co., who could not have brought it in their own names, according to the case of Broghill v. Wellborn, 15 N. C. 511. Whether this objection be valid or not, if taken in apt time, it is not now necessary to say; for, if good, it comes too late. Undoubtedly the holder of a bill may indorse it to another in trust for himself, or to collect as his agent, and the indorsee may have an action against the acceptor of the bill. The objection is not, therefore, that this plaintiff could not maintain assumpsit on these bills, but that he cannot commence that action by attachment, but should have done it by capias. The imputed defect lies in the writ, and the answer is obvious that, by accepting the declaration and pleading to it, the party waives all defects in the process. This point should have been raised by a plea in abatement or in some other method before pleading in bar.

But in the opinion of the court there is another objection to the plaintiff's recovery, which has more force. It is that the bills could not be put into circulation by the indorsement of Peebles, Hall & Co., after those persons had paid them to Rives. If Rives' name had been put on the bills, the case of Beck v. Robley, 1 H. Black. 89, is a direct authority against this action. In that case a bill was drawn by Brown on Robley, payable to Hodgson or order. Hodgson put his name on the bill; and, not being paid when due, Hodgson, without striking out his blank indorsement, returned the bill to Brown, and he took it up, and afterwards passed it to Beck, who brought the action. It was held that when the bill came back unpaid, and was taken up from the payee by the drawer, it ceased to be a bill, for it could not then be negotiated by him without making Hodgson liable thereon, for which there was no color. Between that case and the present there is but one point of difference; and that but increases the difficulties in the plaintiff's way. Hodgson's name was remaining on the bill when he returned it to Brown; whereas it does not appear that Rives ever put his name on these bills, and it cannot be assumed that he did. But waiving that for the present, the case cited is conclusive for the defendant, even if Rives' indorsement were on the bills.

The counsel for the plaintiff, however, opposes to that case the more recent one of Callow v. Lawrence, 3 Maule & Selwyn, 95, and the language there used by Lord Ellenborough: "That a bill of exchange is negotiable ad infinitum, until it has been paid by, or discharged in behalf of, the acceptor; and that, if the drawer has paid the bill, it

seems he may sue the acceptor on the bill, and if, instead of suing the acceptor, he put into circulation upon his own indorsement only, it does not prejudice any of the other parties, who may have indorsed the bill, that the holder should be at liberty to sue the acceptor." But it seems to us that neither the case itself, nor the doctrine here quoted, when correctly understood, shakes the principle of Beck v. Robley, but rather sustains it. No one can deny that a bill is negotiable indefinitely until payment. But the question is, by whom may it be negotiated? Why, by the payee, or by any person entitled under his indorsement; and the acceptor will be as much bound to pay it to such indorsee, however remote, as he was to the payee himself, before he indorsed it. But it does not follow that the drawer of the bill, who takes it up, after dishonor, from the payee, is to be considered the indorsee of the payee. Far from it; for, instead of claiming from the payee or under him, he was, in truth, liable on it to the payee, in default of the acceptor, and in discharge of the liability took it up. Then he could not look to the payee to make the bill good to him; and, by consequence, he could not by his subsequent indorsement give to his indorser the right to such recourse against the payee. But as that would be the necessary effect of such indorsement, if allowed at all, it resulted that in such a case the law would not allow the drawer again to put his bills into circulation. That the payee suffered his name to remain on the bill, when he returned it, will not be an authority to the drawer to negotiate it; for it was not left there to give credit to the bill with the drawer, or, in other words, as an indorsement, but merely as a receipt for the amount paid by the drawer, animo solvendi. After such payment it would be unjust to the payee to allow the drawer to pass the bill on the responsibility of the former; and, therefore, he is not permitted to pass it at all. With this reasoning, the passage quoted from Lord Ellenborough consists.

In Callow v. Lawrence the bill was not, as here and in Beck v. Robley, payable to the third person, but was payable to the drawer's order. After acceptance the drawer indorsed it, and it went through several hands, and was finally returned to the drawer by the holder, who struck out all indorsements after that of the drawer, and received payment from him, and then the drawer passed the bill to Callow; and it was held that the latter might maintain his action against the acceptor. A bill payable to the drawer's order, when accepted, becomes substantially a promissory note from the acceptor to the drawer, being an express promise to pay the drawer or his assigns. When it comes back to the drawer, he is remitted to his original rights upon an instrument payable to himself, and may sue on it, without noticing indorsements that had been made of it. Dook v. Caswell, 2 N. C. 18; Strong v. Spear, 2 N. C. 214; Callow v. Lawrence, 3 M. & S. 95. It would seem to follow necessarily that the drawer might again indorse it; for in so doing he passes the instrument regularly according to its face, and leaves no one liable to his indorsee but himself and the ac-

ceptor, each of whom ought thus to be liable. Gomez Serra v. Berkeley, 1 Wils. 46; Guild v. Eager, 17 Mass. 615.

Upon this distinction between bills payable to a third person, on the one hand, and a promissory note or bill payable to the drawer's order, on the other, are obviously founded the observations of Lord Ellenborough in the case cited. He admits the authority of Beck v. Robley, and carefully confines his rule to the case then before him, that is to say, of a bill payable to the drawer's order, by saying "that if, instead of suing the acceptor, he (the drawer) put the bill into circulation upon his own indorsement only, the holder might sue the acceptor," which can apply to no case but that of a bill payable to the drawer's order or a promissory note. Then he immediately proceeds to declare further that "the case would be different, if the circulation of the bill would have the effect of prejudicing any of the indorsers," as in Beck v. Robley was the case. The other judges place the matter in a still clearer light. Le Blanc, J., said: "There was in Beck v. Robley no color to charge Hodgson, and, striking out Hodgson's indorsement, the bill could not possibly be negotiable." And Bayley, J., who is high authority upon a point of this kind, states the distinction very shortly and happily by saying that "in Beck v. Robley payment by Brown struck out the indorsement of Hodgson, whereas the payment by Pywell (the drawer in Callow v. Lawrence) did not, in legal effect, strike out Pywell's own indorsement, so as to render the bill no longer negotiable." Thus those two cases stand well together. The principle of Beck v. Robley is that which governs this case, and is that a person cannot negotiate paper, when by so doing he would render responsible on it another person, from whom he had taken it up, under a prior responsibility; while the principle of Callow v. Lawrence is that a person who takes up paper once due to himself may again put it into circulation, provided that, in so doing, he exposes no person to a prejudice but himself or those who are legally and justly liable on the paper before him.

In considering the case hitherto, it has been treated as if Rives had put his name on the bills, in which case, even, we have seen that the law is against the plaintiff. But that fact is otherwise here, or, at least, does not appear, which is the same thing. In Beck v. Robley the plaintiff no doubt did sue as the indorsee of Hodgson, the payee, so that he had apparently a regular title to the bill. But this plaintiff declares, not as the indorsee of Rives, but upon the indorsement of Peebles, Hall & Co., which is certainly bad. No person can acquire a title to a bill, payable to the order of Rives, but by the order of Rives. When he gave it back to Peebles, Hall & Co., without his indorsement, it was dead to all intents and purposes as a negotiable instrument. In the words of Mr. Justice Le Blanc, "Striking out the payee's indorsement, the bill could not possibly be negotiated." The indorsement to the plaintiff was a nullity, and he cannot maintain any action on the bills.

New trial awarded.

LEASK et al. v. DEW.

(Supreme Court, Appellate Division, First Department, New York, 1905. 102 App. Div. 529, 92 N. Y. Supp. 891.)

This action was brought to recover upon a promissory note given by the defendant to the plaintiffs' testator. The note was dated November 23, 1901, whereby the defendant promised to pay to the order of Oliver W. Buckingham, the testator, one year after date, the sum of $5,000, with interest at 6 per cent. Oliver W. Buckingham died testate on the 31st day of October, 1903, and upon the probate of his will the plaintiffs duly qualified as his executors. The answer averred, for separate and affirmative defenses, that the testator had canceled the said note by an instrument in writing. Upon the trial of this action the plaintiffs proved the making of the note, the nonpayment of which was admitted, except as stated in the answer, and rested. The defendant then offered proof that after testator's death the note in question was found among his papers, inclosed in an envelope together with the following paper, all in the handwriting of the testator, except the signature of the witness:

"New York, Nov. 25, 1901.

"To My Executors—Gentlemen: The enclosed note I wish to be canceled in case of my death, and if the law does not allow it I wish you to notify my heirs that it is my wish and orders.

"Truly yours, Oliver W. Buckingham.

"Witness: Frank W. Woglom."

Judgment for plaintiffs. Defendant appeals.[10]

HATCH, J. * * * This brings us to the main question in the case—the construction of the written declaration of the testator, which was found in the envelope which contained the note after his death. It is probably true that this declaration was sufficient to discharge defendant's obligation upon the promissory note, within the authority of Wekett v. Raby, 2 Brown's House of Lords Rep. 386. The declaration therein was made a few days before the death of the testator, in these words: "I have Raby's bond, which I keep. I don't deliver it up, for I may live to want it more than he; but when I die he shall have it, he should not be asked or troubled for it."

Suit having been brought upon the bond, it was ordered to be delivered up and canceled, and such decision was affirmed by the House of Lords upon appeal. The declaration in the present case is, in one view, stronger than the declaration in that case, for therein there was the express intention of the testator to keep the bond as a subsisting obligation against Raby, and it was not to be enforced save in the event of his death, when it was to take effect. In the writing under consideration in this case there is no such expression in terms. A

[10] The statement is abridged, and part of the opinion omitted.

similar doctrine was announced in Brinckerhoff v. Lawrence, 2 Sandf. Ch. 412. Therein the Raby Case is cited with approval. The declaration therein was, like the present, limited in its operative force to events which might happen subsequently to the death of the declarant. These cases applied the common-law rule, and, while they are authoritative declarations of the effect of this instrument at common law, they are not controlling in its construction at the present time, for the reason that the force and effect of an instrument of renunciation is now governed by the provisions of section 203 of the negotiable instruments law (Laws 1897, p. 744, c. 612). It reads: "The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing unless the instrument is delivered up to the person primarily liable thereon."

This statute was taken from an act passed by the British Parliament in 1882, known as the "Bills of Exchange Act." It has been quite generally adopted in various states of the American Union. Its provisions are as follows: "(1) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. (2) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

It is readily seen that these two statutes, in character and import, are alike. The only difference is change in the form of phraseology, but it affects neither the sense nor the construction. A single case has arisen in England under the provisions of this statute. In re George, L. R. 44 Ch. Div. 627, decided in 1890. Therein it appeared that the testator desired to have destroyed a note for £2,000. given by Mrs. Francis. Search was made for the same, that it might be destroyed, but it could not be found. At the instance of the decedent, the nurse in attendance upon him wrote at his dictation: "30th August, 1889. It is by Mr. George's dying wish that the check [sic] for £2,000. money lent to Mrs. Francis be destroyed as soon as found." The nurse added to this declaration the words: "Mr. George is perfectly conscious and in his sound mind. [Signed] Nurse T." This transaction took place two or three hours before death. The testator therein left a will, in which he bequeathed to Mrs. Francis, his niece, the sum of £6,000. The executors of the will declined to pay the bequest in full, and thereupon the legatee brought an action to determine the question as to whether the promissory note had been duly canceled. The court, under the provisions of the statute above quoted, determined that the renunciation was insufficient to discharge the note. Upon

the case there presented, I should be disposed to hold that it amounted, within the terms of the act, to an unconditional renunciation of the rights of the testator against the maker of the note. The expression that it was the testator's wish that it be destroyed would seem to constitute an announced declaration to destroy the instrument, and, as such, it was a clear expression of a renunciation of his right to enforce it. In the declaration of renunciation, it is stronger than the instrument relied upon in the present case.

There is some obscurity in the provisions of our statute. In its first sentence it provides for the renunciation of the rights of the holder against any party to the instrument which may be made before, at, or after its maturity. In the second sentence it provides for an absolute and unconditional renunciation of the rights of the holder against the principal debtor at or after the maturity of the instrument, and discharges the instrument. The first relates to the party; the second, to the instrument. It is somewhat difficult to see how there could be an absolute discharge of a party to an instrument without discharging the instrument as an obligation, so far as he is concerned. We do not clearly perceive why this distinction should have been made. It is immaterial, however, to the rights of the parties to the present action. The instrument of renunciation contains no express declaration of the testator to renounce his rights in the note against the party, or of his right to enforce it as a subsisting obligation. The expression is: "I wish [the note] to be canceled in case of my death." There is nothing in these words which can be construed as expressing a renunciation of any rights either against the party or upon the instrument. Had it been delivered to the defendant during the lifetime of the testator, it would not have precluded the latter at any time upon maturity from enforcing the note. There is nothing indicating an intent upon his part not to enforce it during his lifetime. There was no delivery of it to anybody, and while, doubtless, it was sufficiently authenticated to accomplish a renunciation, it had no operative effect whatever, as it did not fall within the statute or comply with its terms.

In principle, the question raised by this case has been decided by this court. Dimon v. Keery, 54 App. Div. 318, 66 N. Y. Supp. 817. Therein the plaintiff's intestate loaned to the defendant a sum of money, taking her promissory note in writing, wherein she agreed to pay the same, with interest, on demand. At the time the note was delivered, the testator indorsed thereon the words: "At my death the above note becomes null and void. Stephen C. Dimon." Dimon continued to retain possession of the note, and the defendant paid interest thereon, but no principal. Dimon died about three years after the execution and delivery of the note. In an action to enforce the same by his administrator, the defendant was held liable thereon, as the indorsement was a mere declaration by the payee of the note as to his intention concerning it, but that it was insufficient as constituting either a gift of money, or an agreement to discharge it as an obligation. The court therein did

not discuss the statute which is here the subject of consideration. It is manifest, however, that the declaration indorsed upon the note was not a renunciation of the liability of the maker during the lifetime of the deceased, or of any renunciation of the obligation of the instrument; and, as it did not constitue a gift or an agreement, it neither fell within the terms of the statute, nor exempted the defendant, for either reason, from liability thereon.

In the instrument relied upon in this case, so far as the direction for cancellation in the event of death, and a command to his heirs to obey his wish and follow his orders, the language is no stronger than the indorsement upon the back of the note in the Dimon Case. Nor is it as strong, because the language there used was a declaration that the note at death "becomes null and void." Here there is simply the expression of a wish to have it canceled, and a direction to the heirs to obey the wish. Consequently the Dimon Case becomes a direct and controlling authority in the disposition of this controversy. As there was no valid renunciation of right of the testator to enforce the note against the party, or of renunciation from liability upon the instrument, and as nothing contained in the declaration otherwise operates to relieve the defendant from liability, it follows that the note remains a valid and subsisting obligation.

The judgment enforcing it should therefore be affirmed, with costs.

INGHAM v. PRIMROSE.

(Court of Common Pleas, 1859. 7 C. B. [N. S.] 82.)

This was an action upon a bill of exchange drawn by one Charles Murgatroyd upon and accepted by the defendant, and indorsed by Murgatroyd to one King, and by King to the plaintiff. * * *

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary term, 1858. The facts which appeared in evidence were as follows: The defendant accepted the bill declared on, and gave it to Charles Murgatroyd for the purpose of procuring it to be discounted for his use. Murgatroyd tried, but in vain, to get the bill discounted, and returned it to the defendant, who in Murgatroyd's presence tore the paper in half and threw it away in the street. Murgatroyd picked up the bill, observing that it was better not to throw it down in the street; whereupon the defendant said nothing. Murgatroyd afterwards pasted together the two pieces of paper, and passed the bill away to one King, who afterwards indorsed it to the plaintiff.

The jury found that the defendant when he tore the bill in half and threw it away intended to cancel it; that King bona fide gave £15. for the bill; but that the transaction between King and the plaintiff was not bona fide.

The learned judge thereupon directed a verdict to be entered for the defendant, but gave the plaintiff leave to move to enter the verdict for him, the court to be at liberty to draw inferences of fact.

Cross, in Easter term, 1858, accordingly obtained a rule nisi.[11]

WILLIAMS, J., now delivered the judgment of the court.

This case was argued before the late Lord Chief Justice, my Brothers WILLES and BYLES, and myself. We are of opinion that the plaintiff is entitled to judgment. It is, we think, settled law that, if the defendant had drawn a check, and, before he had issued it, he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had indorsed in blank a bill payable to his order, and it been lost or stolen before he delivered it to any one as indorsee. See the judgment in Marston v. Allen, 8 M. & W. 504. The reason is that such negotiable instruments have, by the law merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud.

If these were all the facts of the case, it appears to be impossible to distinguish it in any material point from the cases already mentioned, of liability when the original circulation has been effected by fraud, without the consent of him who made the instrument.

The question, then, is whether such liability is precluded by the fact that, before the instrument was put into circulation for the second time, the defendant had torn it, with the intention of destroying or annulling it.

If an act done with such an intention by the maker of a negotiable instrument does not manifest the intention on the face of the instrument, it can hardly be maintained that the act would be of any efficacy; because the instrument would nevertheless be apparently a part of the mercantile currency, as, for instance, if, in the present case, the defendant had merely crumpled up the bill in his hand and thrown it away, and it had been restored to its original appearance, without leaving any trace of the act which was intended to annul it. But if, on the other hand, the act be such that the paper bears on the face of it the signs of something having been done to it which is characteristic of an intention to destroy or annul it, as in the case of Scholey v. Ramsbot-

11 The statement is abridged, and the arguments of counsel omitted.

tom, 2 Campb. 485, where the drawer of a check tore it into four pieces and threw it from him, and the four pieces were afterwards neatly pasted together upon another slip of paper, but the rents were quite visible, and the face of the check soiled and dirty, no holder of an instrument in such a condition could enforce it, because, in truth, no man of ordinary intelligence and caution could fairly regard it as part of the apparent commercial currency.

The case before us, therefore, appears to turn on the question whether the act of tearing the bill into two pieces, being manifest on the face of it, is such an act as prima facie ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation. As we understand the facts, the tearing had been done in such a way that the appearance of the bill when it reached the plaintiff's hands was at least as consistent with its having been divided into two, for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it. It was, properly, a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose. But the point has been so reserved at the trial that the court is to perform the function of the jury in this respect; and we cannot find enough on the facts of the case, or on an inspection of the bill itself, to justify us in coming to such a conclusion.

But it is argued, on the part of the defendant, that the putting together of the two halves under the circumstances amounted to forgery, just as much as if some signature which he had written for a different purpose had been taken from its proper place, and fraudulently attached as his signature to the bill.

This would be a very narrow ground of decision, inasmuch as it would concede that the bill would be enforceable if the tearing had stopped short of utterly dividing the paper, or if the bill had come to the plaintiff's hands in the halves, by two successive posts, with an intimation that it was so sent to him for the purpose of safer transmission.

However, it seems to us that, even assuming that the act of thus reconstructing the bill constituted a forgery (which may admit of grave doubt), yet, on the principle of the decision of Young v. Grote, 4 Bingh. 253, 12 J. B. Moore, 484, this would be no answer to the claim of the plaintiff, because the defendant, by abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff's becoming the holder of it for value, and without having any just cause for supposing that it had been canceled or annulled.

The rule must therefore be absolute for entering a verdict for the plaintiff for the amount of the bill and interest.

PURCHASER FOR VALUE WITHOUT NOTICE

I. Value [1]

BROOKLYN CITY & N. R. CO. v. NATIONAL BANK OF THE REPUBLIC.

(Supreme Court of United States, 1880. 102 U. S. 14, 26 L. Ed. 61.)

Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by the National Bank of the Republic of New York against the Brooklyn City & Newtown Railroad Company, as maker of a promissory note for $5,000, which had been made by the company payable to one of its officers and by him indorsed and delivered to Hutchinson & Ingersoll, a firm of note brokers, for sale for the benefit of the company. Hutchinson & Ingersoll without authority pledged the note, together with other paper, to the plaintiff as collateral security for the repayment of a cash advance of $36,000 made by the plaintiff to them on June 19, 1873. On July 11, 1873, the plaintiff loaned Hutchinson & Ingersoll $10,000. On July 22, 1873, Hutchinson & Ingersoll agreed (antedating the agreement to June 19th) that all collateral which had theretofore been deposited with the plaintiff, including the $5,000 note, should be held by the plaintiff as collateral to the loan of July 11th, and any other loans which the plaintiff might make. Subsequently the $36,000 loan was paid, but $5,136.68 remained due on the $10,000 loan, and the plaintiff claims to be a holder for value by virtue of his position as pledgee of the $5,000 note as security for this balance of $5,136.68. The plaintiff had no knowledge of the breach of trust by Hutchinson & Ingersoll in pledging the note.[2]

Mr. Justice HARLAN. * * * The next proposition involves the right of the railroad company to show as against the bank, that the note was executed and delivered to Hutchinson & Ingersoll for the purpose only of raising money upon it for the company, and that, consequently, they had no authority to pledge it as collateral security for their own indebtedness to the bank. It will have been observed, from the statement of facts, that the note in suit was among those pledged to the bank as security for the call loan of $36,000, made June 19, 1873; that Howes, Hyatt & Co., whose notes had been pledged as security for the

[1] For discussions of principles, see Norton on Bills and Notes (4th Ed.) §§ 123, 124.

[2] The statement of facts is written by the editors. The arguments of counsel, part of the opinion of Harlan, J., and the concurring opinion of Clifford, J., are omitted. Miller and Field, JJ., dissented.

call loan of $10,000, made June 19,[3] 1873, having become insolvent, Hutchinson & Ingersoll, July 22, 1873, at the request of the bank, executed the writing, dated June 19, 1873, whereby they pledged all securities, bonds, stocks, things in action, or other property theretofore deposited with the bank, whether specifically or not, as security for the payment of any and every indebtedness, liability, or engagement held by the bank, for which they were, or should become in any way liable. Although, therefore, the call loan of $36,000 was extinguished, without resorting to the note in suit, that note, under the agreement made July 22, 1873, stood pledged as collateral security, also, for the $10,000 call loan of July 11, 1873.

The bank, we have seen, received the note, before its maturity, indorsed in blank, without any express agreement to give time, but without notice that it was other than ordinary business paper, or that there was any defense thereto, and in ignorance of the purposes for which it had been executed and delivered to Hutchinson & Ingersoll. Did the bank, under these circumstances, become a holder for value, and as such entitled, according to the recognized principles of commercial law, to be protected against the equities or defenses which the railroad company may have against the other parties to the note?

This question was carefully considered, though, perhaps, it was not absolutely necessary to be determined, in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. After stating that the law respecting negotiable instruments was not the law of a single country only, but of the commercial world, the court, speaking by Mr. Justice Story, said: "And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language) that the holder of a negotiable instrument is unaffected with the equities between antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due, we are prepared to say that receiving it in payment of or as security for a pre-existing debt is according to the known usual course of trade and business. And why, upon principle," continued the court, "should not a pre-existing debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of and as security for pre-existing debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely gave a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor, also, has the advantage of making his negotiable securities of equiva-

[3] Obviously this should be July 11.

lent value to cash. But establish the opposite conclusion, that negotiable paper cannot be applied in payment of or as security for pre-existing debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then by circuity to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them which have arrived at maturity? Probably more than one-half of all bank transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for pre-existing debts."

After a review of the English cases, the court proceeded: "They directly establish that a bona fide holder, taking a negotiable note in payment of or as security for a pre-existing debt, is a holder for a valuable consideration, entitled to protection against all the equities between the antecedent parties."

The opinion in that case has been the subject of criticism in some courts, because it seemed to go beyond the precise point necessary to be decided, when declaring that the bona fide holder of a negotiable note, taken as collateral security for an antecedent debt, was protected against equities existing between the original or antecedent parties. The brief dissent of Mr. Justice Catron was solely upon that ground, which renders it quite certain that the whole court was aware of the extent to which the opinion carried the doctrines of the commercial law upon the subject of negotiable instruments transferred or delivered as security for antecedent indebtedness. In the judgment of this court, as then constituted (Mr. Justice Catron alone excepted), the holder of a negotiable instrument, received before maturity, and without notice of any defense thereto, is unaffected by the equities or defenses of antecedent parties, equally whether the note is taken as collateral security for or in payment of previous indebtedness. And we understand the case of McCarty v. Roots, 21 How. 432, 16 L. Ed. 162, to affirm Swift v. Tyson, upon the point now under consideration. It was there said: "Nor does the fact that the bills were assigned to the plaintiff as collateral security for a pre-existing debt impair the plaintiff's right to recover." 21 How. 438 (16 L. Ed. 162). "The delivery of the bills to the plaintiff as collateral security for a pre-existing debt, under the decision of Swift v. Tyson, was legal." 21 How. 439 (16 L. Ed. 162).

It may be remarked in this connection that the courts holding a different rule have uniformly referred to an opinion of Chancellor Kent in Bay v. Coddington, 5 Johns. Ch. (N. Y.) 54, 9 Am. Dec. 268, reaffirmed in Coddington v. Bay, 20 Johns. (N. Y.) 637, 11 Am. Dec.

342. There is, however, some reason to believe that the views of that eminent jurist were subsequently modified. In the later editions of his Commentaries (volume 3, p. 81, note b), prepared by himself, reference is made to Stalker v. McDonald, 6 Hill (N. Y.) 93, 40 Am. Dec. 389, in which the principles asserted in Bay v. Coddington were re-examined and maintained in an elaborate opinion by Chancellor Walworth, who took occasion to say that the opinion in Swift v. Tyson was not correct in declaring that a pre-existing debt was, of itself, and without other circumstances, a sufficient consideration to entitle the bona fide holder, without notice, to recover on the note, when it might not, as between the original parties, be valid. But Chancellor Kent adds: "Mr. Justice Story, on Promissory Notes (page 215, note 1), repeats and sustains the decision in Swift v. Tyson, and I am inclined to concur in that decision as the plainer and better doctrine." Of course it did not escape his attention that the court in Swift v. Tyson declared the equities of prior parties to be shut out as well when the note was merely pledged as collateral security for a pre-existing debt as when transferred in payment or extinguishment of such debt.

According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt, or where it is transferred by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer, or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured, or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor, or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due—in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defense which exists between prior parties to such paper.

Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security merely, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in Swift v. Tyson, is that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this

objection is not sustained by the recognized usages of the commercial world, nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors. Mr. Parsons, in his treatise on the Law of Promissory Notes and Bills of Exchange, discusses the general question of the transfer of negotiable paper under three aspects—one, where the paper is received as collateral security for antecedent debts. We concur with the author "that, when the principles of the law merchant have established more firmly and unreservedly their control and their protection over the instruments of the merchant, all of these transfers (not affected by peculiar circumstances) will be held to be regular, and to rest upon a valid consideration." 1 Parsons, Notes and Bills (2d Ed.) 218.

Another ground upon which some courts have declined to sanction the rule announced in Swift v. Tyson is that upon the transfer of negotiable paper merely as collateral security for an antecedent debt nothing is surrendered by the indorsee—that to permit the equities between prior parties to prevail deprives him of no right or advantage enjoyed at the time of transfer, imposes upon him no additional burdens, and subjects him to no additional inconveniences.

This may be true in some, but it is not true in most, cases, nor, in our opinion, is it ever true when the note, upon its delivery to the transferee, is in such form as to make him a party to the instrument, and impose upon him the duties which, according to the commercial law, must be discharged by the holder of negotiable paper in order to fix liability upon the indorser.

The bank did not take the note in suit as a mere agent to receive the amount due when it suited the convenience of the debtor to make payment. It received the note under an obligation, imposed by the commercial law, to present it for payment, and give notice of nonpayment, in the mode prescribed by the settled rules of that law. We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment and due notice in case of nonpayment—an undertaking necessarily implied by becoming a party to the instrument—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. The correctness of this rule is apparent in cases like the one now before us. The note in suit was negotiable in form, and was delivered by the maker for the purpose of being negotiated. Had it been regularly discounted by the bank, at any time before maturity, and the proceeds

either placed to the credit of Hutchinson & Ingersoll, or applied directly to the discharge, pro tanto, of any one of the call loans previously made to them, it would not be doubted that the bank would be protected against the equities of prior parties. Instead of procuring its formal discount, Hutchinson & Ingersoll used it to secure the ultimate payment of their own debt to the bank. At the time the written agreement of July 22, 1873, was executed, by which this note, with others, was pledged as security for any debt then or thereafter held against them, the bank had the right to call in the $10,000 loan; that is, to require immediate payment. The securities upon which that loan rested had become, in part, worthless, and it is evident that but for the deposit of additional collateral securities the bank would have called in the loan, or resorted to its rightful legal remedies for the enforcement of payment. It was, under the circumstances, the duty of the debtors to make such payment, or to secure the debt. It was important to them, and was in the usual course of commercial transactions, to furnish such security. If the bank was deceived as to the real ownership of the paper, or as to the purposes of its execution and delivery to Hutchinson & Ingersoll, it was because the railroad company intrusted it to those parties in a form which indicated that the latter were its rightful holders and owners, with absolute power to dispose of it for any purpose they saw proper.

Our conclusion, therefore, is that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world. See Bigelow's Bills and Notes, 502 et seq.; 1 Daniel, Neg. Inst. (2d Ed.) c. 25, §§ 820–833; Story, Promissory Notes (7th Ed. by Thorndyke) §§ 186, 195; 1 Parsons, Notes and Bills (2d Ed.) 218, c. 6, § 4; and Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes, where the authorities are cited by the authors. * * *

Mr. Justice BRADLEY. I concur in the judgment rendered in this case, and in most of the reasons given in the opinion. But, in reference to the consideration of the transfer of the note as collateral security, I do not regard the obligation assumed by the indorsee (the bank), to present the note for payment and give notice of nonpayment, as the only, or the principal, consideration of such transfer. The true consideration was the debt due from the indorsers to the indorsee, and

the obligation to pay or secure said debt. Had any other collateral security been given, as a mortgage, or a pledge of property, it would have been equally sustained by the consideration referred to, namely, the debt and the obligation to pay it or to secure its payment. If the indorsers had assigned a mortgage for that purpose, the title of the bank to hold the mortgage would have been indubitable. In that case prior equities of the mortgagor might have prevailed against the title of the bank; because a mortgage is not a commercial security, and its transfer for any consideration whatever does not cut off prior equities. But the bona fide transfer of commercial paper before maturity does cut off such equities; and every collateral is held by the creditor by such title and in such manner as appertain to its nature and qualities. Security for the payment of a debt actually owing is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose, it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange, it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course. And that really ends the argument on the subject.

Judgment affirmed.

II. Notice [4]

GOODMAN v. SIMONDS.

(Supreme Court of the United States, 1857. 20 How. 343, 15 L. Ed. 934.)

Action by Goodman, the holder, against Simonds, the acceptor, of a bill of exchange which had been placed in the hands of one Sigerson to be negotiated by him for the benefit of Simonds. Sigerson pledged the bill as collateral security for his own debt to the plaintiff. Upon the trial the court instructed the jury that "if such facts and circumstances were known to the plaintiff as caused him to suspect, or that would have caused one of ordinary prudence to suspect, that Wallace Sigerson had no interest in the bill, and no authority to use the same for his own benefit, and by ordinary diligence he could have ascertained these facts, then the jury will find for the defendant."

[4] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 125–127.

The plaintiff excepted, and, the jury finding for the defendant, brings error.[5]

CLIFFORD, J. The more important question, whether the instruction was correct, remains to be considered. * * * It was to the effect that, if the plaintiff had acquired the bill under the circumstances described in either branch of the instruction, then he had acted without due caution, and was not entitled to recover. All the other grounds of defense had been provided for in other prayers for instruction. This one was obviously prepared to raise the single question, whether the plaintiff had acted with due caution in acquiring the bill, and consequently assumed all the other requisites of a good title in favor of the plaintiff. The only question, therefore, arising under the instruction, is whether the rule of commercial law applied to the case was correct. Bills of exchange are commercial paper in the strictest sense, and must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. They may be transferred by indorsement; or when indorsed in blank, or made payable to bearer, they are transferable by mere delivery. The law encourages their use as a safe and convenient medium for the settlement of balances among mercantile men; and any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation would be contrary to the soundest principles of public policy.

Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well-defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865, as long ago as 1842; and we adopt that exposition relative to the point under consideration on the present occasion, as one accurately defining the nature and character of the title to those instruments which such holder acquires when they are transferred to him for a valuable consideration. This court then said, and we now repeat, that a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although, as between the antecedent parties, the transaction may be without any legal validity. That question was not one of new impression at the date of that decision, nor was it so regarded either by the court or the learned judge who gave the opinion; on the contrary, it was declared to be a doctrine so long and so well established, and so essential to the security of negotiable paper, that it was laid up among the fund-

[5] The statement of facts is written by the editors. The arguments of counsel and parts of the opinion are omitted.

amentals of the law, and required no authority or reasoning to be brought out in its support; and the opinion on that point was fully approved by every member of the court, and we see no reason to qualify or change it in any respect.

Such being the settled law in this court, it would seem to follow as a necessary consequence, from the proposition as stated, that if a bill of exchange indorsed in blank, so as to be transferable by delivery, be misappropriated by one to whom it was intrusted, or even if it be lost or stolen, and afterwards negotiated to one having no knowledge of these facts, for a valuable consideration, and in the usual course of business, his title would be good, and that he would be entitled to recover the amount. The law was thus framed, and has been so administered, in order to encourage the free circulation of negotiable paper by giving confidence and security to those who receive it for value; and this principle is so comprehensive in respect to bills of exchange and promissory notes, which pass by delivery, that the title and possession are considered as one and inseparable, and in the absence of any explanation the law presumes that a party in possession holds the instrument for value until the contrary is made to appear, and the burden of proof is on the party attempting to impeach the title. These principles are certainly in accordance with the general current of authorities, and are believed to correspond with the general understanding of those engaged in mercantile pursuits.

The word "notice," as used by this court on the occasion referred to, we think must be understood in the same sense as knowledge, and indeed that is one of its usual and appropriate significations. Where the supposed defect or infirmity in the title of the instrument appears on its face at the time of the transfer, the question whether a party who took it had notice or not is in general a question of construction, and must be determined by the court as matter of law; and so it was understood by this court in Andrews v. Pond et al., 13 Pet. 65, 10 L. Ed. 61, where it is said that "a person who takes a bill which upon the face of it was dishonored cannot be allowed to claim the privileges which belong to a bona fide holder. If he chooses to receive it under such circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." And the same doctrine was adopted and enforced in Fowler v. Brantly, 14 Pet. 318, 10 L. Ed. 473, where, in speaking of a promissory note, so marked as to show for whose benefit it was to be discounted, this court held that all those dealing in paper "with such marks on its face must be presumed to have knowledge of what it imported." See Brown v. Davis, 3 Term, 80.

Other cases of like character, where the defect appears on the face of the instrument, are referred to in the printed argument for the defendant as affording a support to the instruction under consideration; but it is so obvious that they can have no such tendency that we forbear to pursue the subject. Ayer v. Hutchins, 4 Mass. 370, 3 Am. Dec.

232; Wiggin v. Bush, 12 Johns. (N. Y.) 306, 7 Am. Dec. 324; Cone v. Baldwin, 12 Pick. (Mass.) 545; Brown v. Tabor, 5 Wend. (N. Y.) 566.

But it is a very different matter when it is proposed to impeach the title of a holder for value by proof of any facts and circumstances outside of the instrument itself. He is then to be affected, if at all, by what has occurred between other parties, and he may well claim an exemption from any consequences flowing from their acts, unless it be first shown that he had knowledge of such facts and circumstances at the time the transfer was made. Nothing less than proof of knowledge of such facts and circumstances can meet the exigencies of such a defense; else the proposition as stated is not true, that a party who acquires commercial paper in the usual course of business, for value and without notice of any defect in the title, may hold it free of all equities between the antecedent parties to the instrument. Admit the proposition, and the conclusion follows. And the question whether the party had such knowledge or not is a question of fact for the jury, and, like other disputed questions of scienter, must be submitted to their determination, under the instructions of the court; and the proper inquiry is: Did the party, seeking to enforce the payment, have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title, as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen.

Every one must conduct himself honestly in respect to the antecedent parties, when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke, in May v. Chapman, 16 Mees. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith. Mere want of care and caution, which was the criterion assumed in the instruction, falls so far below the true standard required by law, which is knowledge of the facts and circumstances that impeach the title, that we feel indisposed to pursue the general discussion, and proceed to confirm the views we have advanced as to what the law is by referring to some of the decisions in the English courts, from which, as an important source of commercial law, most of our own rules upon the subject have been derived.

The leading case, among the more modern decisions in that country, is that of Goodman v. Harvey, 4 Ad. & El. 870. That was a case in bank, on a rule nisi, which was made absolute. Lord Denman, in delivering judgment, said: "We are all of opinion that gross negligence only would not be a sufficient answer, where a party has given consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. Where the bill has passed to the

plaintiff without any proof of bad faith in him, there is no objection to his title." That case was followed by Luther v. Rich, 10 Ad. & El. 784, which was also argued before a full court, and the same learned judge held that the only proper mode of implicating the plaintiff in the alleged fraud by pleading was to aver that he had notice of it, leaving the circumstances by which that notice was to be proved directly or indirectly to be established in evidence; and he further held that an averment that the plaintiff was not a bona fide holder was not equivalent. According to the rule laid down in Goodman v. Harvey, which indubitably is the settled law in all the English courts, proof that the plaintiff had been guilty of gross negligence in acquiring the bill ought not to defeat his right to recover; and, if not, it serves to exemplify the magnitude of the error assumed in the instruction, that any facts and circumstances which would excite the suspicion of a careful and prudent man were sufficient to destroy the title. It is clear that one or the other of these rules must be incorrect; both cannot be upheld.

Gross negligence is defined to consist of the omission of that care which even inattentive and thoughtless men never fail to take of their own property; and if such neglect would not defeat the right to recover—and clearly it would not, unless attended by bad faith—it cannot require any further reasoning to demonstrate that the instruction was erroneous. Several cases have been decided in England upon the same subject, and to the same effect, and the rule laid down in Goodman v. Harvey is now adopted and sanctioned by the most approved elementary treatises upon commercial law. Raphael v. Bank of England, 33 Eng. L. & Eq. 276; Stephens v. Foster, 1 Cromp., M. & W. 849; Palmer v. Richards, 1 Eng. L. & Eq. 529; Arbouin v. Anderson, 1 Ad. & El. (N. S.) 498; May v. Chapman, 16 Mees. & W. 355; Chitty on Bills (12th Ed.) 257; Story on Bills (3d Ed.) § 416; Byles on Bills (4th Am. Ed.) 121 to 126; Smith's Mer. Law (Ed. 1857) 255; Edwards on Bills, 309; 1 Saund. Plea. & Ev. 591; Wheeler v. Guild, 20 Pick. (Mass.) 545, 32 Am. Dec. 231; Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Backhouse v. Harrison, 5 Barn. & Ad. 1098; Gwynn v. Lee, 9 Gill (Md.) 138.

These cases, beyond controversy, confirm the rule laid down by this court in Swift v. Tyson, and they also furnish the fullest evidence, by their harmony each with the other, as well as by their entire consistency with the principal case, that the law has been uniform since the decision in Goodman v. Harvey, which was decided in 1836; and we think it will appear, upon an examination, that it has always been the same, at least from a very early period in the history of English jurisprudence down to the present time, except for an interval of about 12 years, while the doctrine prevailed which is now invoked in support of the instruction in this case. That doctrine had its origin in Gill v. Cubit, 3 Barn. & Cress. 466, and it was followed by the other cases

referred to in the printed argument for defendant. It was decided in 1824, and it is true, as the cases cited abundantly show, that it was acquiesced in for a time as a correct exposition of the commercial law upon the subject under consideration. At the same time, it is proper to remark that there is not wanting respectable authority that it had been much disapproved of before it was directly questioned; and it is certain that, nearly two years before it was finally overruled, Parke, Baron, in delivering judgment in Foster v. Pearson, regarded it as mere "dicta, rather than the decision of the judges of the King's Bench." See Raphael v. Bank of England, per Cresswell.

The reasons assigned for that departure from the long-established rule upon the subject are as remarkable and unsatisfactory as the change was sudden and radical, and yet their particular examination at this time is unnecessary. It is a sufficient answer to the case to say that it has been distinctly overruled in the tribunal where it was decided, and has not been considered an authority in that court for more than 20 years. The doctrine, says Mr. Chitty in his treatise on Bills, is now completely exploded, and the old rule of law that the holder of bills of exchange, indorsed in blank and transferable by delivery, can give a title which he does not possess to a person taking them bona fide for value, is again re-established in its fullest extent. It was not, however, accomplished at a single blow; but the error, so to speak, was literally broken up and destroyed by installments. The foundation of the superstructure was severely shaken in Crook v. Jadis, 5 Barn. & Ad. 909, when the full bench first came to the conclusion that want of due care and caution were insufficient to constitute a defense, and that gross negligence, at least, must be shown to defeat a recovery. But it was left to the case of Goodman v. Harvey to announce a complete correction of the error, when Lord Denman declared we have shaken off the last remnant of the contrary doctrine.

A brief reference to some of the earlier cases will be sufficient to show that the decision in Gill v. Cubit was a departure from the well-known and long-established rule upon the subject under consideration. One of the earliest cases usually referred to is that of Hinton's Case, reported in 2 Show. 247. It was an action of the case against the drawer upon a bill of exchange payable to bearer. The court ruled that the holder must entitle himself to it on a consideration; "for if he come to be bearer by casualty or knavery, he shall not have the benefit of it." And so in Anonymous, 1 Salk. 126, where a bank note payable to A., or bearer, was lost, and found by a stranger, and by him transferred to C. for value, Holt, C. J., held that "A. might have trover against the stranger, for he had no title to it, but not against C., by reason of the course of trade, which creates a property in the bearer." And again in Miller v. Race, 1 Burr. 462, where an innkeeper received a bank note from his lodger in the course of business,

and paid the balance, Lord Mansfield held he might retain it, as he came by it fairly and bona fide, and for value, and without knowledge that it had been stolen. And on a second occasion, in Grant v. Vaughan, 3 Burr. 1516, where a bill payable to bearer was lost, and the finder passed it to the plaintiff, the same court left it to the jury to find whether he came to the possession fairly and bona fide. But a still stronger case is that of Peacock v. Rhodes, 2 Doug. 633, where a bill of exchange, indorsed in blank, was stolen and passed to the plaintiff by a man not known. It was argued for the defendant that a holder should not in prudence take a bill unless he knew the person. Lord Mansfield answered "that the law is well settled that a holder coming fairly by a bill has nothing to do with the transaction between the original parties. * * * The question of mala fides was for the consideration of the jury." And lastly, and to the same effect, is Lawson v. Weston et al., 4 Esp. R. 56, where a bill of exchange for £500. was lost or stolen, and was discounted by plaintiff for a stranger. It was insisted for the defendant that "a banker or any other person should not discount a bill for one unknown, without using diligence to inquire into the circumstances." Lord Kenyon replied that "to adopt the principles of the defense would be to paralyze the circulation of all the paper in the county, and with it all its commerce; that the circumstance of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiff."

The cases cited, commencing in 1694 and ending in 1801, are sufficient to show what the state of the law was in 1824, when Gill v. Cubit was decided, especially as the judges of the King's Bench, in giving their opinions on that occasion, did not pretend that there were any later decisions in which it had been modified. * * *

Judgment reversed.

ROCHESTER & C. TURNPIKE ROAD CO. v. PAVIOUR.

(Court of Appeals of New York, 1900. 164 N. Y. 281, 58 N. E. 114, 52 L. R. A. 790.)

Appeal from a judgment of the Supreme Court, entered April 8, 1898, upon an order of the Appellate Division in the Fourth Judicial Department, overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for the plaintiff upon a verdict directed by the court.

Mrs. Warren, an insurance agent, delivered certain policies of insurance covering premises in New Mexico to the defendant, directing him to collect the premiums due upon the same from the insured. The defendant delivered the policies to one Briggs for the insured, Briggs agreeing to pay the premiums. The premiums were not paid at the

time either set of policies was delivered; but, after payment had been demanded several times by the defendant, Briggs gave him a check on account, dated June 17, 1896, drawn upon the Central Bank of Rochester, payable to the order of the defendant, for $150, signed, "Rochester & Charlotte Turnpike Road Co. M. H. Briggs, Treas." On the 24th of July following, Briggs gave the defendant a check, similar in all respects, except that it was for the sum of $300, and subsequently he paid the balance of the premiums from his own funds. The defendant deposited these checks in the Traders' Bank of Rochester, where he did his banking business, procured drafts for the amount owing to Mrs. Warren, and sent them to her. The checks were paid upon presentation in the ordinary course of business from moneys belonging to the plaintiff on deposit in the Central Bank.

This action was brought to recover the amount paid by means of these checks as money of the plaintiff received by the defendant to its use. The plaintiff had no interest in the policies and no business relations with the defendant, and was indebted neither to him nor to Briggs, who used the checks without authority and thus embezzled the money drawn thereby. At the close of the evidence the court directed a verdict for the plaintiff, but ordered the defendant's exceptions to be heard in the first instance by the Appellate Division, which, after hearing the parties, overruled the exceptions and directed judgment upon the verdict in favor of the plaintiff. From said order, as well as from the judgment entered accordingly, the defendant brings this appeal.[6]

VANN, J. By delivering the policies to Briggs without collecting the premiums at the time, the defendant apparently gave credit for the same and thus made the debt his own. At all events, he subsequently treated it as a debt owing by Briggs to himself, the same as he had similar claims under like circumstances in previous years. Briggs had no authority, either actual or apparent, to give the checks of the plaintiff in payment of his own debt or that of a third person. If the defendant knew or believed, or had good reason to believe, that, in giving the checks, Briggs was appropriating the money of the plaintiff to the payment of his own debt, or one that he treated as his own, he had no right to accept them without inquiry. While he was not bound to be on the watch for facts which would put a very cautious man on his guard, he was bound to act in good faith. Second National Bank v. Weston, 161 N. Y. 520, 526, 55 N. E. 1080, 76 Am. St. Rep. 283; Cheever v. Pittsburgh, etc., R. R. Co., 150 N. Y. 59, 66, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646. Even if his actual good faith is not questioned, if the facts known to him should have led him to inquire, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the

[6] The statement of facts is abridged.

law will withhold from him the protection that it would otherwise extend.

The checks themselves gave notice of a suspicious fact and invited inquiry in relation thereto. They showed upon their face that Briggs was apparently using the money of the plaintiff for his own purposes, since they were not his checks, but the checks of a corporation issued by him as its treasurer. In the absence of express authority, or of that which may be implied from past conduct known to the corporation, he could not lawfully use the checks, which stood as its money, for such a purpose, as the defendant is presumed to have known. There was no express authority and nothing to indicate that Briggs was impliedly authorized to thus use the money of the plaintiff, and the presumption was the other way. The plaintiff, as its name indicated, was not a trading corporation, but a local plank road company, with no authority to own buildings situated out of the state. It would be extraordinary for a concern which merely operated a short plank road in this state to have any interest in buildings in New Mexico, or to be indebted for premiums upon policies issued thereon, and the admitted facts compel us to assume that the defendant so regarded it. Moreover, the policies themselves, as the defendant knew, were not issued in the name of the plaintiff as the owner of the buildings, and there was no connection, apparent or otherwise, between it and the policies. Without inquiry he accepted checks drawn by Briggs as treasurer of the plaintiff in payment of a debt which he had no reason to believe was for it to pay, and which he had strong reason to believe had become the debt of Briggs himself. He called for no explanation from him, made no inquiry at the office of the plaintiff, or of any one representing it, which would naturally have disclosed the fraud, but accepted the checks without question, drew the money, and thereby ran the risk of being called upon to restore it.

The facts known to the defendant should have aroused his suspicion and led him, as an honest man, to make some investigation before he accepted the money of a corporation, which owned him nothing, in payment of a claim that he held against some one else. If he had such confidence in Briggs that he was willing to trust him without inquiry, under suspicious circumstances of a substantial character, he must stand the loss, for he failed to discharge a duty required by commercial integrity. He could not confide in Briggs at the expense of the plaintiff, after notice of his irregular and doubtful conduct. Among the heaviest losses in business are those which result from a blind trust in men on account of their standing in the community, without making the investigation required by common prudence. There was a shadow on the checks, and the defendant could not, in good faith, accept them until it disappeared. By accepting them he did an act which he had reason to believe would affect the rights of a third party, and he could not, in justice to that party, ignore the suspicion which the facts should have aroused. One who suspects, or ought to suspect, is bound to in-

quire, and the law presumes that he knows whatever proper inquiry would disclose. While the courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper, they are also careful to guard against fraud by defeating titles taken in bad faith, or with knowledge, actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint. 2 Randolph, Com. Paper (2d Ed.) § 999; 1 Daniel, Negotiable Instruments (4th Ed.) § 775; 1 Edwards, Bills & Notes (3d Ed.) §§ 517, 520; 1 Parsons, Notes & Bills, 259; Story on Promissory Notes (6th Ed.) § 197; Chitty on Bills (8th Ed.) 281.

As the rules of law governing the case are now well settled, we shall refer to but few authorities, and those of recent date in this court. In Wilson v. Metropolitan El. Ry. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625, it was stated, as a general rule, "that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his own peril. Prima facie the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation." It was also held in that case that the purchaser of a promissory note, purporting to have been issued by a corporation, who made the purchase under circumstances which devolved upon him the duty of inquiry as to its validity, assumed the risk, by failing to inquire, of proving that the facts he could have discovered, had he made inquiry, would have protected him.

In Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234, an agent, who had charge of certain premises known as the "Glass Buildings," deposited the rents collected by him to the credit of a bank account kept in his name as "Agent, Glass Buildings." Without authority he gave a check on this account, signed by him as "Agent, Glass Buildings," in payment of his own debt. The check was paid, and, upon the trial of an action brought five years afterwards to recover the amount thereof, there was no evidence of bad faith on the part of the defendant who took the check, except that afforded by the check itself and the nature of the debt. The court held that the form of the check was sufficient to indicate to the defendant the existence of an agency and to put him on inquiry as to the agent's authority to so use the money. In deciding the case, the court said: "We think that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund. The buildings and the bank were both well known, were in the same city and very near to the place where the check was received by the defendant, and had an inquiry been made at the bank or at the buildings it would have been ascertained that the account was held by William Boswell, not as owner, but as agent for these plaintiffs. In case a person, having notice that money or property is held by another in a fiduciary capacity, receives it without inquiry from

the agent in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner, unless the agent was authorized to so dispose of it."

In Cheever v. Pittsburgh R. R. Co., 150 N. Y. 59, 67, 44 N. E. 701, 34 L. R. A. 69, 55 Am. St. Rep. 646, the paper was regular on its face, and this fact protected the plaintiff; but the court, referring to "a case where an officer of a corporation makes the corporate obligation payable to himself, and then attempts to deal with it for his own benefit," said: "When paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer or agent to issue it"—citing the Wilson and Gerard Cases, supra, and also Hanover Bank v. American Dock & T. Co., 148 N. Y. 612, 43 N. E. 72, 51 Am. St. Rep. 721; Bank of New York, etc., v. American Dock & T. Co., 143 N. Y. 559, 38 N. E. 713. In the case at bar the appearances were not deceptive, but suggested the true state of affairs, which worked a fraud on the plaintiff. See, also, First Nat. Bank of Paterson v. National Broadway Bank, 156 N. Y. 459, 51 N. E. 398, 42 L. R. A. 139; Smith v. Weston, 159 N. Y. 194, 199, 54 N. E. 38; Angle v. North Western, etc., Ins. Co., 92 U. S. 330, 342, 23 L. Ed. 556.

The case of Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979, affirmed without opinion in 155 N. Y. 637, 49 N. E. 1096, which is relied upon by the defendant, does not conflict with the views herein expressed. According to the facts found in that case, a new firm had succeeded an old firm, composed in part of the same members, and with a similar, but not identical, firm name. The business of the new firm "was apparently the same as and a continuation of that" of the old, "and such appearance was a natural result of the conduct and acquiescence of the other members of the new firm, from the formation and during the entire continuance thereof." "In fact, the business and assets of the old firm were so mingled with those of the new firm as to establish a practical identity between the two firms." The new firm gave certified checks to be applied upon an indebtedness of the old, which the former had not assumed. Said checks were received "in absolute good faith" and collateral securities were surrendered in consequence thereof. Under these peculiar circumstances it was decided that the receiver of the new firm, which had become insolvent, could not recover the money back. Owing to the intimate connection, if not substantial identity, of the two firms, the Supreme Court held that there was nothing suspicious or unusual in paying a debt of the old firm with a check of the new concern, nor any notice that in so doing the funds of the new partnership were being improperly used. It was natural to assume, under the circumstances, that the new firm had bought out the old, and being indebted to it for the purchase price, had paid a part of the debt in this way through the direction of a member common to both. "to whom," as the trial judge found, "the other three partners confided the unrestricted, absolute, and entire control

and management of the business, allowing him to conduct it as though it were his own, and in its behalf to incur liabilities and dispose of assets absolutely according to his own judgment." Thus it is obvious that the managing copartner had implied authority from his associates to use the checks as he did, and that the question of notice was not necessarily involved in the decision.

In the case now before us the question of notice is supreme. The checks, when read in the light of the facts known to the defendant, were notice to him that he was apparently accepting money from one to whom it did not belong, and this cast upon him the duty of inquiring into the matter so as to see whether the facts were in accord with the appearances; for, if they were, he knew that he could not honestly take the checks.

The judgment appealed from should be affirmed, with costs.

III. Presumptions and Burden of Proof [7]

KERR v. ANDERSON.

(Supreme Court of North Dakota, 1907. 16 N. D. 36, 111 N. W. 614.)

MORGAN, C. J. Action upon a promissory note by the plaintiff, as indorsee, against the defendant, as maker thereof. The complaint alleges the execution and delivery and nonpayment of the note at maturity, and that the same was duly indorsed to the plaintiff before maturity for a valuable consideration in due course of business. The answer is a general denial. A jury was impaneled. Plaintiff established the due indorsement of the note by the payee, and offered the note in evidence, which was received without objection, and thereupon rested. Defendant rested without offering any evidence. Plaintiff moved the court to direct a verdict in his favor, and the motion was denied. The defendant then moved for a directed verdict in his favor, which was granted. Plaintiff excepted to the rulings on each of these motions. Plaintiff thereafter moved for a judgment notwithstanding the verdict, and for a new trial. Both motions were denied. Plaintiff appeals from the order denying these motions.

The record does not disclose the grounds upon which the trial court granted defendant's motion for a directed verdict. In their printed argument, the defendant's attorneys attempt to sustain the trial court's action upon the ground that plaintiff offered no evidence to show that he was an innocent purchaser of the note before maturity. It was not necessary to offer such evidence. The presumption is that

[7] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 128–131.

the indorsement was made in the regular course of business. The statute expressly so declares, and every holder of negotiable instruments is deemed prima facie to be a holder in due course, unless the title of the person negotiating the instrument is shown to be defective for fraud or other reasons. When this is shown, the burden is then upon the holder to show that he took the instrument in due course. Section 6361, Rev. Code 1905. This court has often held that the holder of a negotiable instrument is not primarily bound to establish that he is an innocent purchaser. Shepard v. Hanson, 9 N. D. 249, 83 N. W. 20; Id., 10 N. D. 194, 86 N. W. 704. Plaintiff produced the note in court duly indorsed, and by so doing established prima facie that he acquired title thereto in due course of business. Daniel on Neg. Ins. § 812, and cases cited.

The fact that plaintiff alleged in his complaint that the note was purchased by him before maturity did not make it incumbent on him to establish that fact by evidence. The statutory presumption was in force with or without such allegation. It was therefore error to direct a verdict in defendant's favor. Plaintiff requests this court to order judgment in his favor notwithstanding the verdict. This is not a proper case for such a judgment. Defendant may be able to show upon another trial that the allegations of the complaint are not true. * * *

Order reversed.

PRESENTMENT AND NOTICE OF DISHONOR

I. Presentment [1]

GOUPY et al. v. HARDEN et al.

(Court of Common Pleas, 1816. 7 Taunt. 159.)

This was an action brought against the defendants as indorsers of two bills of exchange, for £400. and £600. drawn on 12th May, 1815, by De Franca & Co. upon Gould Bros. & Co., merchants at Lisbon, at 30 days after sight, payable to the defendants, and by them indorsed to the plaintiffs, who were merchants at Paris, and who indorsed the bills to Ricci & Sons, merchants at Genoa, who also negotiated the bills. The bills were presented to Goulds for acceptance, on the 22d August in the same year, when they were refused, and protested for nonacceptance; but were accepted by Montano, under protest, for the honor of Ricci & Co. The bills were again, on 20th September, when due, presented to Goulds for payment, which was also refused, and a protest made, and Montano paid them for the credit of Ricci & Co., whereby the plaintiffs were obliged to pay the amount of the bills, with costs, charges, interest, exchange, and re-exchange. Upon the trial of this cause, at the sittings in London after Trinity term, 1816, before Gibbs, C. J., it appeared that the plaintiffs had employed the defendants, who were merchants in London, for a commission of one half per cent., to procure in London, and transmit to them to Paris, bills on Portugal for £1,000. The plaintiffs accordingly purchased upon the Exchange the bills in question, and having specially indorsed them to the plaintiffs, transmitted them to Paris; the plaintiffs indorsed them to Ricci & Sons, merchants at Genoa, who further negotiated them. On the 15th of July, De Franca failed. Goulds had paid bills drawn on them so late as the 30th of June, 1815. On the 12th of October, the plaintiffs by letter apprised the defendants of the dishonor of the bills, and in a subsequent letter stated that they should certainly have sooner sent forward the bills for acceptance, had they not relied on the defendants' guaranty. The defendants contended, first, that they, having indorsed these bills to the plaintiffs only as their agents, were not liable on that indorsement. Evidence was given that when agents indorse foreign bills for the mere purpose of transmitting them, without intending to incur responsibility for the payment, it is their practice to add to the indorsement the words "sans recours"; that these words

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 133–144.

however, implying a doubt in the mind of the indorser of the stability of some of the parties, injure the credit of the bills, and therefore are usually omitted, if a confidence exists between the parties, although it is nevertheless intended that the agent should not be responsible for the goodness of the bills; and the defendants contended that such was the course of dealing in the present instance, as evinced by the low rate of commission which the defendants were to receive. The defendants also contended that they were discharged by laches; for that the bills ought to have been sooner presented to the drawee for acceptance, and not sent round from Paris to Italy, by which the presentment for acceptance, and consequently the period of payment, had been many months delayed; and if the bills had been presented for acceptance in the beginning of June, they would have been payable before Goulds ceased to honor the drawers' demands, and before the drawers themselves had become insolvent. The jury, however, found a verdict for the plaintiffs; which

Lens, Serjt., now moved to set aside, on the grounds, first, that an agent, under these circumstances, was not liable upon his indorsement; next, that the presentment of a bill payable at, or a certain time after sight, could not be protracted to an indefinite or unreasonable period without discharging the parties.

Gibbs, C. J. This is an action brought against the indorser of two bills at 30 days' sight; and the verdict is for the plaintiffs. Objections are made to their right to recover, on two grounds: First, that though the bills were indorsed by the defendants, the defendant, under the circumstances, is not liable on his indorsement. Secondly, that there has been laches in not presenting the bills for acceptance within a shorter time. As to the first objection, here is an unqualified indorsement. It is not proved that the plaintiffs knew that the defendants were connected with the bill otherwise than as agents; but if they had known it, and I will take it in the strongest way, that they knew the defendants were acting only as agents, still they had a right to consider, that in this transaction the defendants were liable as indorsers; and they may justly say, as they have done: "We should have sent forward these bills for acceptance, unless we had seen your names on them, which placed the respectability of the bills beyond a question; otherwise we should have sought the security of the drawee."

But this leaves the second objection untouched. If these bills had been locked up and not sent into circulation, the case would have been widely different. I know dicta may be found, that a bill payable at sight must be presented within a reasonable time; but this very question occurred in this Court in the case of Muilman v. De Eguino, 2 H. Bl. 565, bills were sent out to India, and one question was, whether they were presented for acceptance within a reasonable time in India, and it was held that they were; but the main question was, whether they were delayed too long in Europe, before they were sent out. Upon the last point, Eyre, C. J., says: "There would be a great difficulty

in saying at what time such a bill should be presented for acceptance. The courts have been very cautious, in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance; and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. I do not see how the courts can lay down any precise rule on the subject." Heath, J., says: "No rule can be laid down as to the time for presenting bills drawn payable at sight or a given time after." The jury have found that these bills were presented in a reasonable time, but the law prescribes only that they must be presented at some time. Buller, J., is still stronger, and lays down the rule only that the bill must be put into circulation. In the present instance, these bills were put into circulation, and they passed through Paris and Genoa. He proceeds to say: "If they are circulated, the parties are known to the world, and their credit is looked to, and if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches. But if, instead of putting it into circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches." I am therefore clearly of opinion that the parties were not guilty of laches in putting this bill into circulation, before it was presented for acceptance.

DALLAS, J. The defendants might have specially indorsed this bill sans recours, if they had thought fit so to do, but they have not done it.

The rest of the court concurred in refusing the application.

HART v. SMITH.

(Supreme Court of Alabama, 1849. 15 Ala. 807, 50 Am. Dec. 161.)

Error to the county court.

The facts of this case are fully shown in the opinion of the court.

Stone, for plaintiff in error.

T. J. Judge, contra.

1. Bills payable at sight, being different from those payable on demand (Chit. [9th Ed.] 410), should be presented for acceptance within a reasonable time, and before payment thereof be demanded. Chitty on Bills (10th Ed.) 274; Fernandez v. Lewis, 1 McCord (S. C.) 322. For (sight meaning acceptance) bills payable at or after sight do not become due until after they are accepted, or protested for nonacceptance. Brown v. Turner, 11 Ala. 752; Chitty on Bills (10th Ed.) 272; Stephen's N. P. 875, and authorities there cited. And, after acceptance, it is now well settled that such bills are entitled to days of grace. Chitty on Bills (9th Ed.) marg. pp. 409, 410; Chit. on Bills (10th Ed.) marg. pp. 376, 377, and note T, on page 377; Bailey on Bills (5th Ed.) 98; Forbes on Bills, 142; Janson v. Thomas, B. R. Trinity Term, 24 Geo. III; Dixon v. Nuttall, 1 C., M. & R. 307; Dehers v. Harriot, 1 Show. 163; Coleman v. Sayer, 1 Barnard, 303; Viner's Ab. tit. "Bills

Ex."; 3 Dougl. 421; Selwyn's N. P. (9th Ed.) 351. In the case at bar, then the presentment for payment was premature and a nullity. 1 Mason, 176; Wiffen v. Roberts, 1 Espinasse, 262; Brown v. Harraden, 4 Term R. 148; Griffin v. Goff, 12 Johns. (N. Y.) 423; Savings Bank v. Bates, 8 Conn. 505; Piatt v. Eads, 1 Blackf. (Ind.) 87. The authorities cited by plaintiff in error, showing it unnecessary to protest an inland bill, to authorize a holder to recover, have no application. There is a difference, between protest and notice.

DARGAN, J. This was an action of assumpsit, on a bill of exchange, drawn by the defendant, in favor of the plaintiff, on Desha & Smith, dated the 26th February, 1846, payable at sight. The only evidence introduced to charge the drawer was the bill, and protest, showing a demand of payment made of the drawees, on the 4th of March, 1846, and notice to the drawer. The court charged the jury that the plaintiff could not recover.

A bill, payable on demand, or at any fixed time, need not be presented for acceptance; but a demand of payment, at the time the holder has the legal right to demand payment, is all that is necessary. And if the bill be not paid, the holder may protest it for nonpayment, and, on his giving due notice to the drawer and indorsers, their liability is fixed. Evans v. Bridges, 4 Port. 348; Bank of Washington v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Townsley v. Sumrall, 2 Pet. 170, 7 L. Ed. 386; Chitty on Bills (10th Ed.) 272. But when the time of payment is uncertain and a presentation of the bill is necessary, in order to ascertain, and fix, the time of payment, as if the bill be payable at a number of days after sight, then the bill must be presented for acceptance before payment is demanded. Story on Bills, § 112, 227; Chitty on Bills (10th Ed.) 272; Bayley on Bills (5th Ed.) 217, 218.

It is contended that a bill payable at sight is entitled to days of grace, and therefore it must be presented for acceptance before payment can be demanded.

I am free to confess that my opinion, untrammeled by authority, would incline me to hold that a bill of exchange, payable at sight, is not entitled to days of grace, and that payment may be demanded on presenting the bill, which, if refused, would authorize the holder forthwith to have it protested for nonpayment, and, on giving notice to the drawer, to hold him liable. But the law seems to be settled otherwise. Judge Story, in his treatise on Bills, says "that days of grace are allowed on all bills, whether payable at a certain time after date, after sight, or even at sight; and although there has been some diversity of opinion whether bills payable at sight are entitled to days of grace, it is now settled by the decisions, both in England and America, that days of grace are allowable on such bills." Section 342, p. 429. To the same effect, see Chitty on Bills (10th Ed.) 376; Bayley on Bills (5th Ed.) 244, 245; Selwyn's N. P. (9th Ed.) 351; Coleman v.

Sayre, 1 Barnard, 303; Dehers v. Harriet, 1 Show. 165; Stephen's N. P. 876. Under the influence of these authorities, I feel constrained to hold that a bill payable at sight is entitled to days of grace; consequently, a demand of payment made of the drawer, upon the first presentation of the bill to him, is insufficient to charge the drawer, for the bill is not then due. As there was no evidence of any previous presentation of the bill for acceptance, nor notice given of nonacceptance, the demand of payment was prematurely made, and was therefore a nullity.

As the evidence fails to show a demand of payment on the day the bill was payable, the court correctly instructed the jury that the plaintiff could not recover.

Let the judgment be affirmed.

GIFFORD v. HARDELL.

(Supreme Court of Wisconsin, 1894. 88 Wis. 538, 60 N. W. 1064, 43 Am. St. Rep. 925.)

This action was brought to recover against the defendant, as indorser, the amount of four checks drawn on the Commercial Bank of Milwaukee by one Musselman, in favor of divers persons, and which had been indorsed to the defendant, who on the 17th of July, 1893, sold and indorsed them to the plaintiff. They were indorsed and delivered to the plaintiff's father, at Dousman, Waukesha county, Wis., who at once mailed them to the plaintiff, at New Richmond, Wis. The checks were not presented for payment until the 21st of July, when the Commercial Bank had failed, and were protested for nonpayment.

The only question was whether the plaintiff, or his agent, the Manufacturers' Bank of New Richmond, Wis., which undertook the collection of the checks, used due diligence in presenting them for payment. They were forwarded to the plaintiff, at New Richmond, by his father, on the day they were indorsed, and received by him, by due course of mail, July 18th, at 5 o'clock p. m., and were at once delivered to said Manufacturers' Bank for collection. It immediately inclosed and mailed the checks to its bank correspondent in Chicago for collection, according to its usual custom, having no regular bank correspondent in Milwaukee. They were received and forwarded by the National Bank of Illinois, of Chicago, to Milwaukee, Wis., but were not presented for payment until the 21st of July. The Commercial Bank of Milwaukee, upon which they were drawn, failed, closing its doors at the usual hour on the 20th of July. There was a direct mail route from New Richmond to Milwaukee, and thence to Chicago, the latter city being about 85 miles south of Milwaukee. The evening mail of the 18th of July at this time left New Richmond at 8:41 p. m., and would have reached Milwaukee at 11 o'clock in the forenoon of the 19th, and Chi-

cago at about 1 o'clock of the same day; and the checks arriving at Milwaukee, as above stated, could have been presented for payment at 10 o'clock in the morning of the 20th, while the bank on which they were drawn was honoring its checks. The court held that sending them by way of Chicago for collection was not the use of reasonable diligence in presenting them for payment, and directed a verdict for the defendant, and from a judgment thereon in favor of the defendant the plaintiff appealed.

PINNEY, J. (after stating the facts as above). The same rules which exist in relation to the necessity of presentment and notice, in order to charge the indorser of bills of exchange in general, apply as well to an indorser of a check. A check on a bank is presumed to be drawn against deposited funds, and, unlike a bill of exchange, which need not be drawn on a deposit, is generally designed for immediate payment, and not for circulation. For this reason it is of greater importance than in the case of a bill that a check shall be promptly presented, and the drawer notified of nonpayment, so that he may speedily inquire into the cause of refusal, and take prompt measures to secure his funds deposited in the bank. The indorsers of bills and of checks stand on the same footing in reference to the effect of delay or failure in making presentment, or giving notice of nonpayment, and are absolutely and entirely discharged if presentment be not made within a reasonable time; and this rule applies as between an indorser and indorsee, as in the present case.

It is plain from the facts that, if the bank at New Richmond had forwarded the checks direct to Milwaukee for collection, they would have been received, at the furthest, in time for presentation and payment on the 20th of July, and while the bank on which they were drawn was transacting its usual business; and it appears that it had ample funds of the drawer, with which to have paid them. The period of reasonable time for presentation, as between the plaintiff and the defendant, as indorser, undoubtedly began when the checks were delivered to the plaintiff's father for him, at Dousman, Waukesha county, Wis., on the 17th of July. Daniel, Neg. Inst. §§ 1586, 1587, and cases in notes. The drawer of a check cannot rightfully withdraw his funds necessary for the payment of it upon proper presentation, and it would be unjust to hold that, however long the holder might permit the fund to remain, it should be at the drawer's risk. Hence, the check must be presented within a reasonable time, or the indorser will be discharged, and the fund is at the risk of the holder, if he permits the deposit to remain. No transfer, or series of transfers, can prolong the risk of the drawer or indorser beyond this period, though each party is allowed the same period, as between himself and his immediate predecessor, that the payee had, as between himself and the drawer; for no transferee can stand on any better footing than his transferrer, in respect to the time within which the check must be presented in order to render the drawer's or previous indorser's liability absolute in

the event of the failure of the bank. Daniel, Neg. Inst. § 1595, and cases in note.

The rule of diligence, as between indorsee and indorser, is the same as between payee and drawer. This requires, in general, that, where the payee receives the check from the drawer in a place distant from the place where the bank on which it is drawn is located, it will be sufficient for him to forward it by post to some person at the latter place on the next secular day after it is received, and then it will be sufficient for the person to whom it is thus forwarded to present it for payment on the day after it has reached him by due course of mail. When the defendant delivered the checks, properly indorsed, at Dousman, Wis., on the 17th of July, he had a right to assume and expect that the plaintiff, or his father, would present them for payment within a reasonable time, and they took the risk of making such presentment. Instead, they were sent several hundred miles to the northwest of Milwaukee, to New Richmond, and then back, through Milwaukee, to Chicago, and were then returned to Milwaukee for payment on the 21st, as before stated. It is clear that they were not presented for payment within a reasonable time after indorsement and delivery by the defendant, and the judgment of the county court was therefore correct. First Nat. Bank v. Miller, 37 Neb. 500, 55 N. W. 1064, 40 Am. St. Rep. 499, and cases cited.

The judgment of the county court is affirmed.

GRANGE v. REIGH et al.

(Supreme Court of Wisconsin, 1896. 93 Wis. 552, 67 N. W. 1130.)

On the 20th day of July, 1893, defendants were indebted to plaintiff in the sum of $1,211. After banking hours on that day, in the city of Milwaukee, where plaintiff resided, defendants gave him a check for the amount of such indebtedness on the South Side Savings Bank, located in said city. Such check was not presented for payment either on that or the succeeding day, July 21st. The bank was open for business all of such succeeding day, and would have paid the check had it been presented during that time. The bank did not open for business after the 21st, by reason of which the check was not paid. This action is to recover the amount of the check from the drawers. The circuit court decided that, because of the failure to present the check for payment to the bank within a reasonable time, recourse upon the drawers was lost; and accordingly judgment was rendered for the defendants, and plaintiff appealed.

MARSHALL, J. (after stating the facts as above). The settled law applicable to the facts of this case is that, if a person receives a check on a bank, he must present it for payment within a reasonable time, in order to preserve his right of recourse on the drawer in case of non-

payment by the drawee; and that, when such person resides and receives the check at the same place where such bank is located, a reasonable time for such presentation reaches, at the latest, only to the close of banking hours on the succeeding day, excluding Sundays and holidays. Tiedeman Com. Paper, § 443; 2 Daniel, Neg. Inst. § 1590, 1591, and cases cited; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859. Plaintiff failed to comply with the law in this respect; hence defendants were discharged from all liability to answer for the default of the bank. Such was the decision of the trial court, and it must be affirmed.

GORDON v. LEVINE.

(Supreme Judicial Court of Massachusetts, Suffolk, 1907. 194 Mass. 418, 80 N. E. 505, 10 L. R. A. (N. S.) 1153, 120 Am. St. Rep. 565, 10 Ann. Cas. 1119.)

MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated December 30, 1905, which was Saturday, though there was some question whether it was actually drawn and delivered on that day, or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it, but that he presented it Monday morning, January 1st, and was told there were no funds; and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him, receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein who deposited it on January 4th, in the Faneuil Hall National Bank, in Boston, for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5th, to the bank on which it was drawn, the Provident Securities & Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant the bank had failed and that the defendant promised to make the check good. The defendant denied this, and also the plaintiff's statement that he had asked the plaintiff not to present the check for a couple of days, and introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have down to the failure of the bank. It was admitted that the bank failed on Friday, January 5th, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff and the case is here on exceptions

by the defendant to the refusal of the judge to give certain instructions that were requested, and to the admission of certain testimony.

The defendant, in substance, asked the judge to instruct the jury that a check must be presented for payment in a reasonable time and that in order to have been presented within a reasonable time the check in suit should have been presented before the close of banking hours on Monday; that its transfer to successive holders would not extend the time for presentment, and a presentment on January 5th would not be within a reasonable time and if the bank failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent. The judge gave in part the instruction thus requested, and refused it in part. He instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday that would be within a reasonable time. But he refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. On the contrary he instructed them that "the court had occasion to consider that in one case in this commonwealth (referring, we assume to Taylor v. Wilson, 11 Metc. 44, 45 Am. Dec. 180); and it is there stated that a check may also be passed from hand to hand and a reasonable time is allowed to each party receiving the same to present it for payment." And after calling their attention to the provisions of the statute (Rev. Laws, c. 73, § 209) that in considering what a reasonable time is "regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case," left it to them to determine whether the check was presented on Monday, or, if they were not satisfied that it was, then to determine whether if it passed, from hand to hand and each one had a reasonable time to present it the presentment on Friday was within a reasonable time. For aught that appears the jury may not have been satisfied that the check was presented on Monday and may have found for the plaintiff on the ground that the presentment on Friday was within a reasonable time. The question is therefore distinctly raised whether a presentment on Friday could have been found to be within a reasonable time.

The general rule is as was stated by the judge and as is provided in the negotiable instruments act (Rev. Laws, c. 73, § 203) that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented and the drawer sustains a loss by reason of the failure of the drawee he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instrument which though defined in the negotiable instruments act (Rev. Laws, c. 73, § 202) as "a bill of exchange drawn on a bank payable on demand" is intended for immediate use (Mussey v. Eagle Bank, 9 Metc. 306, 314) and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the

loss if any resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The negotiable instruments act provides generally (Rev. Laws, c. 73, § 209) as the judge said that "in determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is that where the drawer and drawee and the payee are all in the same city or town a check to be presented within a reasonable time should be presented at some time before the close of banking hours on the day after it is issued and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss it falls not on him but on the holder. * * *

The case of Taylor v. Wilson, 11 Metc. 44, 45 Am. Dec. 180, relied on by the plaintiff, was a case where a check was drawn by one doing business in Charlestown and living in Roxbury on a bank in Charlestown in favor of a resident of Newport. The check was dated September 30, 1842, which was Friday, and was received by the payee Saturday evening, October 1st. On Tuesday, October 4th, having been previously cashed for the payee by a local bank, it was given by the cashier of that bank to a messenger to be carried to the Merchants' Bank at Providence in the usual course of remitting its funds and securities and was received by that bank on Wednesday and sent by its cashier to the Suffolk Bank at Boston. That bank received it on the next day (October 6th) and presented it on the same day to the bank on which it was drawn and payment was refused; the bank having closed its doors on Monday morning, October 3d, and being insolvent. The case was submitted to the court on agreed facts with power to draw inferences and the court found in favor of the payee and against the drawer. The court held in effect that under the circumstances there had been no laches and that the check had been presented within a reasonable time. There is a sentence in the opinion to the effect that a check may pass from hand to hand and that a reasonable time is allowed to each party receiving it to present it for payment and the case has been cited to that point with approval in Veazie Bank v. Winn, 40 Me. 60. But we do not think that the court meant to lay down the rule that under any and all circumstances each party receiving a check from a previous holder was entitled to a reasonable time to

present it for payment, or that the case required that it should lay down such a rule. On the contrary the court expressly said that a party receiving a check was not guilty of laches if he did not present it on the same day on which it was drawn, but was allowed a reasonable time for that purpose, and that the next day was held to be such reasonable time. The decision should be limited to the case before the court which was that of a check drawn on a bank in one place and sent to a payee in another place at considerable distance and forwarded for presentment in the usual course of business, and, so understood and applied, was correct. It follows from what has been said that the exceptions must be sustained. The conclusion to which we have come on the principal question renders it unnecessary to consider the questions of evidence, though we may observe that we see no error in regard to them.

Exceptions sustained.

COLUMBIAN BANKING CO. v. BOWEN.

(Supreme Court of Wisconsin, 1908. 134 Wis. 218, 114 N. W. 451.)

Appeal from Barron county circuit court.

June 10, 1903, the banking firm known as the Farmers' & Merchants' Bank, of Bangor, Wis., sold to the defendant a $400 draft, drawn in the usual form, dated on that day, payable to defendant's order, and drawn by such firm on the National Bank of North America, at Chicago, Ill. The draft was sent to the defendant at Barron, Wis., and was indorsed by him to A. R. Tabbert, to whom it was forwarded by mail, at Spokane, Wash., June 16, 1903, and was there received by him June 20th thereafter. He was at Spokane temporarily and was on his way to the city of San Francisco, Cal. July 14, 1903, he indorsed the draft and sold the same to the plaintiff at such city, receiving $400 therefor. On that day, in due course, plaintiff sent the draft by mail to the Bankers' National Bank, of Chicago, Ill., by which it was received July 18th thereafter, and was then, as requested, duly presented to the drawee for payment, which was refused, whereupon it was duly protested for nonpayment by a duly authorized notary public, who forwarded a manifest thereof with notices of protest for A. R. Tabbert, the plaintiff and the defendant, to the plaintiff at San Francisco, Cal., and also sent due notice to the National Bank of North America at Chicago, Ill., and to the drawer at Bangor, Wis., July 19, 1903. Plaintiff upon receipt of the manifest and notices duly sent the one for defendant to him at Barron, Wis., by whom it was duly received, and sent the one for Tabbert by mail to his post office address and reputed place of residence, that being San Francisco, Cal. Thereafter due demand was made on defendant for payment of the draft, and the same was refused. July 28, 1903, the property of the drawer was placed in the possession of a receiver, who duly paid upon the

draft $144.49, January 6, 1904, $61.93, May 20th thereafter, and $30.96, June 5th following. Plaintiff was the owner of the draft at the time of the commencement of the action, and at the time of the trial thereof there was due thereon $210.

The pleadings presented issues for decision involving facts as above detailed. The case was tried by the court resulting in findings of fact in accordance with the statement, and a conclusion of law that plaintiff became the owner of the draft in due course, and was entitled to judgment for $210, with costs. Judgment was accordingly rendered.

MARSHALL, J. (after stating the facts as above). Counsel for appellant have presented quite an extended argument, referring to many authorities, as to the law antedating and independently of the negotiable instrument statute (Sanborn's St. Supp. 1906, §§ 1675 to 1684—6; chapter 356, p. 681, Laws 1899) to support the proposition, that appellant was released from liability on the instrument in question, because of the period intervening between his parting therewith and the presentation thereof to the drawee for payment. Such statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and, therefore, so far as it speaks without ambiguity as to any such question, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading.

The negotiable instrument law is not merely a legislative codification of judicial rules previously existing in this state making that written law, which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law merchant generally as recognized here, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states. That it contains some quite material changes in previous rules governing commercial paper we have had occasion heretofore to point out. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Aukland v. Arnold, 131 Wis. 64, 111 N. W. 212.

The primary question discussed by appellant's counsel, it is believed is fully covered by the negotiable instrument law. There are a multitude of decisions regarding the character of a bill of exchange and that of a check, as those terms are used in business transactions, and to what extent the incidents of one are identical with those of the other, which decisions are so variant in their phrasing of the matter as to produce more or less confusion in respect thereto with many apparent, and some real, conflicts, to remedy which was one of the principal objects of the law.

To that end it was provided in section 1680, "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or bearer," and it was further provided

in section 1684—1, "A check is a bill of exchange drawn on a bank, payable on demand."

As to whether the incidents of the species of bills of exchange last mentioned are the same as those of bills of exchange generally, it was further provided in the section last referred to, "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The only exception referred to material to this case is contained in section 1684—2, in these words: "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

Keeping in mind that the discharge from liability above referred to because of unreasonable delay after the issuance of a check in presenting it for payment, is of the drawer only, and that this action is against the payee who indorsed the instrument in question without qualification and put it in circulation, we turn to section 1678—1, which provides, as to a bill of exchange payable on demand, which from the foregoing obviously includes a check or draft on a bank of the character of the one in question, "presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof."

From the foregoing it seems plain that as regards the payee of such an instrument as we have here, who puts the same in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing the same, presentment for payment is sufficient, as regards their liability, if made within a reasonable time after the last negotiation. A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed, so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed. Section 195, Selover, Neg. Inst. Law.

As to an ordinary bill of exchange put in circulation, it was quite anciently held that the period between July 18th of one year and January 16th of the next year was not necessarily unreasonable. Gowan v. Jackson, 20 Johns. (N. Y.) 176. Perhaps one might now keep a bill of exchange for such length of time as to destroy its circulating character notwithstanding he ultimately passed it along to another person, but that situation, as we view the case, does not exist here.

Applying the law as aforesaid to the facts of this case it is readily seen that the delay in presenting the paper for payment between its date and the negotiation to the bank at San Francisco is immaterial. Appellant unqualifiedly indorsed the paper and put it in circulation by

sending it to Tabbert at a distant part of the country, probably knowing that he was a traveler. Tabbert received the paper while journeying with the intention of going to San Francisco and held it till he arrived there and then negotiated it. It was promptly presented for payment thereafter and so in time, as regards that circumstance, to preserve the liability of appellant.

The court decided, as indicated, that Tabbert was a traveler with San Francisco as his destination and properly held that such circumstance sufficiently explained, if any explanation were necessary, the lapse of time between his reception of the paper and his negotiation thereof, preserving its circulating character and warranting the finding that the respondent came thereby in due course.

The point is made that the instrument was not presented to the drawee for payment during banking hours. The negotiable instrument law at section 1678—2 provides that "Presentment for payment to be sufficient, must be made: * * * at a reasonable hour on a business day. * * *" The evidence shows that the paper, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of 3 and 6 o'clock. The proof is to the effect that such was the customary way of doing such business in Chicago, where the drawee was located. That is, as we understand it, that the business day of the bank continued after the closing of the clearing house transactions so as to enable banks holding paper for collection, refused recognition in such transactions, to present the same for payment as was done in this case. That satisfies the statute. What constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question. In case of a transaction occurring in a foreign jurisdiction, as in the instance in question, the court cannot take judicial notice of what constitutes reasonable hours on a business day. 1 Daniel on Neg. Inst. (5th Ed.) § 601. It is a matter of proof, though in case of the notarial certificate of the transaction, as here, being regular so as to furnish prima facie proof that the paper was duly presented for payment, that raises the presumption that the presentment was made at a proper time. Cayuga County Bank v. Hunt, 2 Hill (N. Y.) 635.

Judgment affirmed.

COMMERCIAL NAT. BANK OF SYRACUSE v. ZIMMERMAN et al.

(Court of Appeals of New York, 1906. 185 N. Y. 210, 77 N. E. 1020.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 5, 1905, affirming a judgment in favor of defendant Zimmerman, entered upon a decision of the court on trial at Special Term.

The plaintiff brought this action to foreclose a lien on certain bonds of a railroad company, which it had held as collateral security for the payment of a note of the defendant, the Syracuse Construction Company, indorsed by Joseph Zimmerman, and to recover a judgment for any deficiency, arising upon the sale of the bonds, against Zimmerman's estate. The note reads as follows: "$10,000. Syracuse, N. Y., Sept. 16, 1899. On demand after date we promise to pay to the order of Joseph Zimmerman ten thousand dollars at Commercial Bank. Value received with interest. Syracuse Construction Co., per J. S. Kaufmann, Treas."

Upon the trial of the issue, which was had without a jury, the trial judge found, as the facts of the case, that the note was indorsed by Zimmerman, without consideration and for the accommodation of the maker; that on September 20, 1899, the plaintiff discounted the note for the maker, the defendant construction company, receiving the bonds of the railroad company as collateral security for its payment; that, in January, 1903, Zimmerman died intestate, and his widow, this defendant, was appointed his administratrix; that on April 9, 1903, the note was presented to the maker for payment and, payment being refused, was duly protested for nonpayment; that "said note was not presented within a reasonable time after it was issued and that said plaintiff did not demand the payment thereof, or give notice of the dishonor thereof, within a reasonable time." Upon these facts, he reached the legal conclusion that the plaintiff was entitled to enforce a lien upon the bonds by the sale thereof; but that, as the "presentment of said note was not made within a reasonable time after the discount," the indorser, Zimmerman, and his estate were released from all liability thereon. Upon the plaintiff's appeal from so much of the judgment thereupon entered, as adjudged that it was not entitled to judgment against the estate of the indorser for the deficiency upon a sale of the bonds, the Appellate Division, in the fourth department, by a unanimous vote, affirmed the judgment as rendered. The plaintiff now appeals to this court.

GRAY, J. (after stating the facts as above). The only question of importance, which this appeal presents, is of the correctness of the decision that the presentment of the note for payment had not been made by the plaintiff within a reasonable time. That must, necessarily, turn upon the effect of the enactment of the provisions of the negotiable instruments law of 1897. Laws 1897, p. 719, c. 612. Section 131, p. 736, of that law provides that, where the instrument "is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof." By section 4, it provided that "in determining what is a 'reasonable time,' or an 'unreasonable time,' regard is to be had to the nature of the instrument, the usage of trade or business

(if any) with respect to such instruments, and the facts of the particular case."

Prior to this legislative enactment, the decision of this court in Merritt v. Todd, 23 N. Y. 28, 80 Am. Dec. 243, was regarded as having settled the rule of law applicable to the determination of such cases. In that case, the note was payable on demand, with interest, and the question arose as to the continuance of the indorser's liability, where three years had intervened between the making and presentment for payment. Chief Judge Comstock, with the concurrence of the majority of the judges, undertook to resolve what he regarded as the existing uncertainty, as to the rule, which conflicting decisions had brought about, by referring the interpretation of the contract to the adoption of one of two principles. By the one principle, a promissory note, payable on demand with interest and indorsed, is to be regarded as a continuing security and no dishonor attaches until payment is required and refused. By the other, or opposing, rule the holder, if he wishes to charge the indorser, must make his demand of the maker without delay. Judge Comstock finds no intermediate ground to stand upon and holds "that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives, we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require upon a check or sight draft. * * * But * * * we think that a note payable on demand with interest is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and refusal to pay. * * * If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the meantime a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is that it is indefinite or indeterminative, and ascertainable only by an actual call for the money; and if that be the meaning of the principal parties the indorser must be deemed to lend his name to the contract with the same intention. * * * We see no good reason why a note, like the one now in question, should not be construed precisely according to its terms, and if we follow that construction such instruments are not dishonored by the mere effluxion of time."

Although the decision in Merritt v. Todd was subsequently discussed, and in some cases criticized, its authority was not shaken as es-

tablishing a rule of law and it was expressly followed as late as in Parker v. Stroud, 98 N. Y. 379, 50 Am. Rep. 685. See Herrick v. Woolverton, 41 N. Y. 581, 1 Am. Rep. 461; Pardee v. Fish, 60 N. Y. 265, 19 Am. Rep. 176; Crim v. Starkweather, 88 N. Y. 339, 42 Am. Rep. 250. Judge Comstock followed the doctrine of the English courts, in differentiating notes payable on demand with interest, from those payable on demand merely. He sought to give effect, in the former case, to what seemed to be an intention of the parties that, notwithstanding the terms, there should be no immediate demand, and that the time of payment should be future; thus making the instrument a continuing obligation.

The law being thus settled in this state, the negotiable instruments law was passed, in 1897, as the outcome of a general movement to bring about a uniform law in this country covering the subject of bills and notes. It was a codification of the law and in the respect which we are considering it modified the rule as formulated in Merritt v. Todd. It established one rule, which was to be applicable to all cases, that where an instrument "is payable on demand presentment must be made within a reasonable time after issue." No distinction was to be made, as theretofore, when the instrument was an interest-bearing obligation. While therefore it must be regarded as changing the rule upon the subject of the time for the presentment of such instruments, by placing them upon the same footing, the fourth section of the law has to be given effect; which requires, in determining what is a reasonable time, a consideration to be had of the nature of the instrument, any usage of trade and the facts of the particular case. That would certainly be sufficient to authorize the differentiation of bills, or promissory notes, from other instruments for the payment of money; but even where it is a question of the time within which a demand note must have been presented, the facts and circumstances of the case must be regarded. If a note is payable on demand, it is always mature and may at any time be demanded. The statute of limitations commences to run against the maker from its issue. Herrick v. Woolverton, 41 N. Y. 587, 1 Am. Rep. 461. After its issue, what constitutes reasonableness of time for its presentment cannot be determined by any fixed rules; for, plainly, the particular circumstances may be such as to evidence some intention of the parties as to its continuance. And certainly they may be sufficient to justify an inference of unreasonable delay.

In my opinion, what the Legislature intended to accomplish by the provisions of the negotiable instruments law in question was to do away with the distinction between notes, or bills, payable on demand, which Merritt v. Todd had created, and to leave the question of their reasonable presentment for payment, in order to charge the parties to them, as one for the determination of the court upon the facts. That

question, if the facts were unsettled and the testimony was conflicting, might be a mixed one of law and fact, which the jury should decide, under the instructions of the court as to the law; but where they are ascertained, and are not in dispute, the question is one of law. Aymar v. Beers, 7 Cow. 705, 709, 17 Am. Dec. 538; Mohawk Bank v. Broderick, 10 Wend. 304, 308; Carroll v. Upton, 3 N. Y. 272; Hunt v. Maybee, 7 N. Y. 266, 272.

In the present case the defendant offered no evidence, and there was no dispute about the facts. The trial judge had before him the facts of the discount of a demand note, bearing interest; that the indorsement by Zimmerman was without consideration and for the maker's accommodation; that its payment was secured by the deposit of certain securities; that notwithstanding that some two years after the making of the note the plaintiff had complained to Zimmerman of its nonpayment and twice, a year later, had written that the maker was in default as to the interest, no steps were taken to charge the indorser, by presentment of the note for payment and by protest for nonpayment, until more than three and a half years had elapsed. If the finding that the note was not presented within a reasonable time depended for its justification upon the evidence, we should be, undoubtedly, concluded from reviewing it by the rule of unanimous affirmance. But viewing it, as I think we must, as a question of law to be decided by the court upon the ascertained facts, it depended upon the interpretation of the statute as applied to the facts and, in my opinion, the decision of the trial court was correct.

It is argued by the appellant that the defense that the note was not presented within a reasonable time after its issue was one which should have been specially pleaded in the answer. This objection was not taken upon the trial; but, assuming that it could properly be raised upon the appeal, it is untenable. The burden is on the holder of a note, when seeking to charge an indorser, to prove due and timely presentment, and the giving of notice to the indorser of its dishonor. The obligation of the indorser is conditional upon all the steps having been taken by the holder, which the statute has prescribed as to presentment, and as to notice of nonpayment, etc. The negotiable instruments law is the codification of the law merchant upon the subjects treated, and in setting forth what is required of the holder of a note it casts upon him the burden to prove that the requirements were all complied with. They were necessary conditions of his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute, and the liability of the indorser to make good the contract of the maker, unlike that of a guarantor, is conditional and depends upon the holder's having made a case under the statute of an obligation, which he has caused to mature and, by appropriate legal steps, to become an indebtedness of the contracting parties. Brown v. Curtis, 2 N. Y. 225. Therefore I think it would be incorrect to hold of this defense that it is of an affirmative nature and, like the defense

of usury, or any other defense which avoids an obligation, that it must be pleaded to be available.

No other question demands consideration and, for the reasons given, I advise the affirmance of the judgment, with costs. * * *

Judgment affirmed.

DANA v. SAWYER.

(Supreme Judicial Court of Maine, 1843. 22 Me. 244, 39 Am. Dec. 574.)

The action is on a promissory note signed by T. Sawyer & Co., dated December 24, 1838, for $202.50, on four months, payable to and indorsed by the defendant. The case was submitted on an agreed statement of facts. The court were to enter a nonsuit or default, as they might determine the law in the matter.[2]

SHEPLEY, J. This case is presented upon an agreed statement of facts, from which it appears that a demand for payment was made upon the maker of the note, between 11 and 12 o'clock at night on the day that it became payable, by calling him from his bed, and that he did not pay it. There is no further statement of anything else said or done, except that a notice and demand for payment was left with him. When a bill or note is payable at a bank, banking house, or other place, where it is well known that business is transacted only during certain hours of the day, the law presumes that the parties intended to conform to such established course of business, and requires that a demand should be made during those business hours. Parker v. Gordon, 7 East, 385. The cases of Garnett v. Woodcock, 1 Starkie, 475, and of Henry v. Lee, 2 Chitty, 124, may show an exception to this rule, that, when a person is found at such place after business hours authorized to give an answer, the demand will be good. While it may be difficult to reconcile these cases with the case of Elford v. Teed, 1 M. & S. 28, when the bill or note is not payable at a place where there are established business hours, a presentment for payment may be made at any reasonable hour of the day. Leftley v. Mills, 4 T. R. 174; Barclay v. Bailey, 2 Campb. 527; Triggs v. Newnham, 10 Moore, 249; Wilkins v. Jadis, 2 B. & Ad. 188. What hour may be a reasonable one has come under consideration in those cases. In the first of them Mr. Justice Buller observes that "to say that the demand should be postponed till midnight would be to establish a rule attended with mischievous consequences." In the second Lord Ellenborough said: "If the presentment had been during the hours of rest, it would have been altogether unavailing." In the third this remark, among others, is quoted and approved by Chief Justice Best. In the fourth, Lord Tenterden remarked that "a presentment at 12 o'clock at night, when a person has retired to rest, would be unreasonable." These observa-

[2] The statement of the case is abridged.

tions, so just and so applicable to this case, authorize the conclusion that the demand was not made at a reasonable hour, unless the fact that the maker was seen and actually called upon at that time should make a difference. Perhaps, in analogy to the exception already noticed, it might be proper to admit of one in this and the like cases, if it should appear from the answer made to the demand that there was a waiver of any objection as to the time, or that payment would not have been made upon a demand at a reasonable hour. But there is nothing in this agreed statement to show that payment might not have been refused because the demand was made at such an hour that the maker did not choose to be disturbed, or because he could not then have access to funds prepared and deposited elsewhere for safety.

Plaintiff nonsuit.

II. Notice of Dishonor[3]

PINKHAM v. MACY.

(Supreme Judicial Court of Massachusetts, Suffolk and Nantucket, 1845. 9 Metc. 174.)

Assumpsit on the following note, held by the plaintiff, as executrix of the last will of Seth Pinkham, to whom it was indorsed by the payee:

"Nantucket, April 1, 1837.

"At the termination of the ship Obed Mitchell's present voyage, for value received, I promise to pay to the order of Josiah Macy eight hundred and fourteen dollars and forty one cents, with interest till paid.

"James Mitchell."

At the trial in the court of common pleas, at Nantucket, before Ward, J., the signatures of the maker and indorser were admitted; and the plaintiff, to prove demand on the maker, and notice to the defendant as indorser, called J. M. Bunker, a notary public, who testified that the defendant had always resided in Nantucket; that Mitchell, the maker, resided there at the date of the note, but that he removed his business and family to the city of New York before the arrival of the ship Obed Mitchell; that said ship arrived at the bar of Nantucket, on Sunday June 27, 1841; that the witness, on the next day, took said note, as notary public, and went to the place of business formerly occupied by the maker, in Nantucket, and found it closed; that he then went to the house formerly occupied by the maker, in Nantuck-

[3] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 146, 147.

et, and found another family residing there, but then presented the note and demanded payment thereof, which was refused; and that he thereupon made and gave to the defendant this notice:

"Nantucket, June 28, 1841.

"Please to take notice that a promissory note for $814.41, with interest, dated October 1, 1837, payable at the termination of ship Obed Mitchell's voyage, now completed, signed by James Mitchell, and indorsed by you, remains this day unpaid, and that the holders look to you for payment thereof. Done at the request of Seth Pinkham.

"James M. Bunker, Notary Public. [Seal.]

"To Josiah Macy."

The judge ruled that said notice was not sufficient to charge the indorser; and the jury found a verdict for the defendant. The plaintiff alleged exceptions to said ruling.

SHAW, C. J. The question is whether due notice was given to charge the indorser. This subject was so fully discussed in the recent case of Gilbert v. Dennis, 3 Metc. 495, 38 Am. Dec. 329, that it seems only necessary to inquire whether this case falls within the principles laid down in that case. The rule there laid down was that the notice must be such as to inform the indorser, either in terms or by reasonable implication, that the note was dishonored; that is, that it had been presented for payment, and payment refused, or other act done, which by law is deemed equivalent. It is not necessary to state what has been done; whether an actual demand was made, or that the note lies over at a bank where, by contract or by usage, it was payable, or that the maker has absconded. All this is matter of proof afterwards, to show the fact of dishonor. But the notice must be such as to assert or imply that the note has been presented and payment refused, or otherwise dishonored. It was also stated that a notice simply that the note is unpaid is sufficient, where, from the terms of the note, nonpayment and lapse of time constitute such dishonor. So, when a note is payable at a bank, it is the duty of the maker to pay it at the bank, on the last day of grace. Then a notice dated after bank hours, on that day or the next day, simply informing the indorser, who is presumed to know the terms and purport of the note, that it is, at that time, unpaid, is notice of dishonor. But in case of a note not payable at a place certain, where presentment or inquiry is necessary, in order to make a demand, such a notice, either on or after the day of payment, is not, in terms, or by intendment or implication, notice that it has been demanded, or that it is dishonored.

In the present case, all that was stated in the notice might be strictly true, though no presentment and demand had been made, and though the maker had not left the island, and no inquiry for him had been made. It is, therefore, exactly within the case of Gilbert v. Dennis. It was suggested, in the argument, that there is a difference, because, in the present case, the notice was given by a notary public. But this

can make no difference in principle; and we think it would not be expedient for the community that a rule of law so universally important should depend on new or slight distinctions. A notary public, in such case, is the mere agent of the holder. His service is not required, as in case of a foreign bill of exchange, to make a protest. City Bank v. Cutter, 3 Pick. 414.

A case may happen, where a reference to a protest by a notary public, which term implies a demand and refusal, may be important, because it intimates, by implication, that the note has been dishonored: As where the notice of nonpayment is accompanied with notice that the holder looks to the indorser for payment, with costs, or fees, or charges of protest. This may be sufficient to show, by reasonable intendment, that it has been protested for nonpayment, which is notice of dishonor. But the present notice carries no such implication, but is a simple notice of nonpayment, without intimation of dishonor.

There seems to be another good ground of defense, namely, that the demand and notice were too soon. If the arrival of the ship at Nantucket was not the termination of the voyage, then they were too soon. If it was such termination, then it became a day certain, and the note was entitled to grace.

Exceptions overruled.

LINN v. HORTON.

(Supreme Court of Wisconsin, 1863. 17 Wis. 151.)

Yates and Gray, for value, gave their note, indorsed for them by Horton before delivery, and payable to the plaintiffs or order at the Rock County Bank, at Janesville, in this state. Before the note became due, the plaintiffs, who were merchants in the city of New York, indorsed it for collection to Kissam & Taylor, bankers in the same city, who indorsed it and sent it for collection to the Central Bank of Wisconsin, at Janesville. Default having been made in its payment when due, to wit, November 22, 1861, it was duly protested, and on the same day the note and notice of protest for Horton, and like notices for Kissam & Taylor and the plaintiffs respectively, were inclosed in an envelope and deposited in the post office at Janesville, post paid, directed to Kissam & Taylor, who received the same November 27th. On the same day Kissam & Taylor delivered to the plaintiffs the notices addressed to them and to Horton respectively; and the plaintiffs, on the same day, inclosed the notice for Horton in an envelope directed to him at Janesville, and deposited the same post paid, in the post office at New York; but the notice was never, in fact, received by Horton. This action was brought against Horton together with the makers; but the circuit court found that "the notary, who protested the note, did not use due diligence to ascertain the residence of Horton," and there-

upon held that proper steps had not been taken to charge him, and rendered judgment in his favor; from which the plaintiffs appealed.[4]

DIXON, C. J. It is an established principle of mercantile law that, if the holder of a bill or note chooses to rely upon the responsibility of his immediate indorser, there is no necessity for his giving notice to any previous party; and if such notice be properly given, in due time, by the other parties, it will inure to the benefit of the holder, and he may recover thereon against any of them. Thus, if the holder notifies the sixth indorser, and he the fifth, and so on to the first, the latter will be liable to all the parties. 1 Parsons on Bills and Notes, 503, 504; and Edwards on Bills and Notes, 473, 474, and the cases cited. And it is no objection to such notice that it is not in fact received so soon by the first or any prior indorser, as if it had been transmitted directly by the holder or notary, provided it has been seasonably sent by each indorser as he receives it. Colt v. Noble, 5 Mass. 167; Mead v. Engs, 5 Cow. (N. Y.) 303; Howard v. Ives, 1 Hill (N. Y.) 263. And the same degree of diligence must be exercised on the part of the indorser in forwarding notice as is required of the holder. Ordinary diligence must be used in both cases. He is not bound to forward notice on the very day upon which he receives it, but may wait until the next. Howard v. Ives, and the authorities cited.

For the purpose of receiving and transmitting notices, those who hold at the time of protest, and those who indorse as mere agents to collect, are regarded as real parties to the bill or note; the former as holders in fact, and the latter as actual indorsers for value. Mead v. Engs; Howard v. Ives.

It follows, from these principles, that the proper steps were taken to charge the defendant Horton as indorser. Notice for him was forwarded by mail, post paid, on the day of the protest, to the agents and last indorsers in New York, and delivered by them, on the day it was received, to the plaintiffs, their immediate indorsers, who, on the same day, deposited it, inclosed in an envelope, post paid, in the post office at New York, directed to the defendant at Janesville, Wis., his proper post office.

Under these circumstances the only question which can possibly arise is whether the defendant ought to be discharged by reason of the notice not having been in fact received by him. He testifies that it was not. Professor Parsons observes that in all the cases of constructive notices, where notice given by a subsequent to a prior indorser has been held to inure to the benefit of the immediate indorser, it has appeared that the notice was actually received; and he raises a question whether this would be so if the notice was sent to the wrong place. 1 Pars. on Notes and Bills, 504, note, and 627. But here the notice was sent to the right place. Besides, the plaintiffs, who seek to avail themselves of the notice, are the indorsers who sent it to the defendant as the in-

[4] The arguments of counsel and part of the opinion are omitted.

dorser next immediately preceding them. We have already seen that the rule of diligence as to them is the same as in the case of the holder. * * *

Judgment reversed.

AMERICAN EXCH. NAT. BANK v. AMERICAN HOTEL VICTORIA CO. et al.

(Supreme Court of New York, Appellate Division, 1905. 103 App. Div. 372, 92 N. Y. Supp. 1006.)

LAUGHLIN, J. The action is against Charles M. Reed, the maker, and the appellant, as the indorser, of a promissory note payable to the order of Costikan Freres. The complaint alleges that the appellant duly indorsed the note prior to maturity, having received full value therefor, and delivered the same to the payee for full value; that the payee subsequently and before maturity, for full value, duly indorsed and delivered the note to the plaintiff; that the note was duly presented for payment at the First National Bank of Erie, Pa., where it was made payable, and payment thereof duly demanded and refused, whereupon it was duly protested for nonpayment, and that notice thereof was forthwith duly given to all of the indorsers. The answer of the appellant put in issue, among other things, the allegations of the complaint concerning notice to it of the presentation of the note for payment, the demand and refusal of payment, and of the protest. The plaintiff proved the making and indorsement of the note, the delivery to it, and offered the note in evidence with the notary's certificate showing that he protested it for nonpayment on the 14th day of October, 1901, the day it fell due.

For the purpose of proving the service of the notice of protest on the appellant, the plaintiff called one Mairs, who testified that on the 16th day of October, 1901, he served an original notice of protest made by the notary at Erie, Pa., on the 14th, and addressed: "To American Hotel Victoria Co. S. B. A. Price, Prest."—upon the appellant at the Victoria Hotel, Broadway and Twenty-Seventh street, by leaving it "at the cashier's window." He does not show that the cashier or any one else was present or that he drew the attention of any one thereto, or that he made any effort to find any officer of the defendant, or any one in charge of the hotel, to whom to deliver it. The defendant called Mr. Sweeney, who testified that he was elected president of the defendant and purchased its capital stock on the 2d of January, 1901, and continued to be president down to the time of the trial; that he had charge of the management of the business of the appellant and of the hotel during the same period, and on the 16th day of October, 1901; that he did not see or receive any notice of the protest or dishonor of the note, and the first he knew of the existence of the note, or heard of it, was when he received a letter from attorneys stating that they had

the note for collection; and that, unless it was paid within a certain time, action would be brought thereon. At the close of the evidence, counsel for the appellant moved to dismiss the complaint upon the ground, among others, that the plaintiff had failed to prove notice to it of the dishonor of the note. The motion was denied, and an exception taken.

We are of opinion that the judgment must be reversed. The appellant is sued solely as indorser of this note. The evidence is wholly insufficient to show the service of the notice of protest upon it. Negotiable Instruments Law (Laws 1897, p. 704, c. 612) §§ 160, 167, 168, provide that notice of dishonor, to charge an indorser, may be given by delivering it personally or through the mail either to the party himself, or "to his agent in that behalf." This doubtless was not intended to change the rule as it theretofore existed. Eaton & Gilbert on Com. Paper, 489. Where personal service is relied upon, the evidence must show either actual personal service, or an ordinarily intelligent, diligent effort to make personal service, upon the indorser, either at his place of business during business hours, or at his residence if he have no place of business; but, if he be absent, it is not necessary to call a second time, and the notice may in that event be left with any one found in charge, or, if there be no one in charge, or no one there, then the giving of notice is deemed to be waived. Stewart v. Eden, 2 Caines, 121, 2 Am. Dec. 222; Bank of Commonwealth v. Mudgett, 45 Barb. 663; Id., 44 N. Y. 514; New York & Alabama Contracting Co. v. Selma Savings Bank, 51 Ala. 305, 306, 23 Am. Rep. 552; Allen v. Edmondson, 2 Exch. Rep. 719; Williams v. Bank of U. S., 2 Pet. 96, 7 L. Ed. 360; Huffcut's Negotiable Instruments, p. 47. The evidence in this case shows that personal service was not made upon any officer of the corporation, and there is no evidence that the notice was left with any agent of the corporation, or even where it might be reasonably inferred that an officer or agent of the corporation would receive it. It does not even appear upon what floor or in what part of the hotel the cashier's window was, at which the notice was left. There can be no inference from such evidence that the notice was received by the corporation; and the president and manager of the hotel, who was in charge, testifies that it was not brought to his attention.

Judgment reversed.

III. When Presentment or Notice of Dishonor Excused, and When Due Diligence Dispensed with [5]

REED v. SPEAR.

(Supreme Court, Appellate Division, Fourth Department, New York, 1905. 107 App. Div. 144, 94 N. Y. Supp. 1007.)

HISCOCK, J.[6] This case was brought on for trial before the county judge and a jury. At the close of the evidence each side moved for a direction of a verdict, and therefore any questions of fact or divergent inferences from the evidence are to be regarded as having been settled in favor of the plaintiff.

The action was brought against the defendant as indorser of a promissory note made by one Harry A. Lamkin, dated at Sinclairville, Chautauqua county, N. Y., August 9, 1900, whereby said maker, for value received, promised "to pay Emma Reed, or bearer, four hundred dollars and annual interest in the following manner to wit: $100 of the principal August 9, 1902; $100 August 9, 1903; $100 August 9, 1904, and $100 August 9, 1905, the interest to be paid annually on the 9th day of August of each year; the undersigned to have the right to pay any part or the whole of said principal sum before the same shall become due."

Recovery was sought with interest on the three installments of principal becoming due respectively August 9, 1902, August 9, 1903, and August 9, 1904. Upon the trial, plaintiff abandoned his claim as to the first installment, but recovered upon the last two. It is insisted by the defendant that such recovery was erroneous, that no proper or necessary evidence was given of the presentment or notice of dishonor of said note as to said installments, and that the evidence given by plaintiff tending to excuse him from presentment and notice of dishonor was incompetent and improperly received under his complaint.

We conclude that plaintiff has failed to establish the necessary notice of dishonor of said note as to said first installment, and cannot recover therefor, but that he established a right to recover as to the second installment embraced in the judgment.

Plaintiff having abandoned his claim to the installment becoming due August 9, 1902, we need not discuss that.

Lamkin, the maker of the note, died a few days before the installment of August 9, 1903, became due. A few days after the same became due, one Chessman was appointed administrator of his estate. Emma J. Reed, the payee and owner of the note, died March 7, 1904,

[5] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 148, 148a.

[6] Parts of the opinion are omitted.

and subsequently plaintiff was appointed her administrator. No place of payment being specified in the note, and the person primarily liable thereon being dead; and no personal representative having been appointed, the holder of the note was excused from presenting the same for payment of the installment becoming due in August, 1903, under the provisions of section 136 of the negotiable instruments law (Laws 1897, p. 737, c. 612), which reads as follows: "Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found."

But as we construe the statute, the holder of the note, although excused under the circumstances from presentment for payment, was not excused from giving notice of dishonor to the indorser. Section 160 (page 739) of the statute referred to provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given * * * to each endorser and any * * * endorser to whom such notice is not given is discharged."

Section 143 (page 738) provides that: "The instrument is dishonored by nonpayment when: (1) * * * (2) Presentment is excused and the instrument is overdue and unpaid."

These sections seem to make it clear that, although presentment for nonpayment may be excused under such circumstances as existed in this case, the indorser is still entitled to notice of dishonor of the instrument by its being overdue and unpaid.

No proof was offered of notice to the defendant indorser of the dishonor of the note as to this installment, except as the plaintiff seeks to have it supplied by inferences drawn from certain conversations with the defendant, but which we feel are insufficient for that purpose. * * *

We pass to the consideration of the installment becoming due in August, 1904. At this time an administrator had been appointed of the maker of the note and also of the holder. The latter lived at Sinclairville, in Chautauqua county. The former resided at Fredonia, in said county, some distance from the former place, and connected therewith by railroad. At the time this installment became due he was, however a member of a banking firm which had its place of business in Sinclairville, and was also interested in other business industries located in the same place, and was accustomed to spend more or less time in looking after said interests. Upon the day when the installment became due, plaintiff went two or three times to the banking office for the purpose of presenting the note to the maker's said administrator, but was unable to find him. He also sought him at the railroad station near the seat of his other business interests, and at a time when he might be expected to take or alight from a train, but did not find him.

Having failed to find him at about 9 o'clock in the evening, he drew a notice, of which the following is a copy:

"Sinclairville, August 9, '04.

"To W. N. Spear: Take notice that the last $100 installment of a note given to Emma J. Reed August 9th, 1900, by Harry Lamkin and endorsed by you fell due this day and remains unpaid at this hour of 9 p. m. and that I shall look to you for payment.

"C. M. Reed, Admin. E. J. Reed Est."

Upon the following day he sought to serve this notice upon the defendant at his store in Fredonia, but after one or more efforts, having failed to find him, delivered it, sealed and addressed, to defendant's wife in the store, who acted as his clerk and assistant. There is evidence that the notice was actually received by the defendant upon the date of service, August 10, 1904.

Upon this evidence the county judge was entitled, as a matter of fact, if not of law, to find a sufficient compliance by plaintiff with the provisions of the negotiable instruments law applicable to such a case. Under section 136, already quoted, the obligation existed to make presentment of the note to the personal representative of the maker if "with the exercise of reasonable diligence he could [can] be found." And, conversely, under section 142 (page 738), presentment for payment was dispensed with where the same could not be made "after the exercise of reasonable diligence." Section 167 (page 740) provided that the notice of dishonor "may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument, and indicate that it has been dishonored by nonacceptance or nonpayment." Sections 167 and 168 respectively provide that such notice may be given by delivering it personally or through the mails, and that it may be given either to a party himself or to his agent in that behalf.

The evidence fairly warranted a finding that reasonable diligence was exercised by plaintiff in his effort to present for payment the note to Mr. Chessman as administrator of the maker of the note. No question is raised but that the notice of dishonor was served in due time, and we think no question can be successfully made but that said notice was sufficient in form and properly served upon defendant's wife and agent, especially in view of the fact that it actually came into defendant's possession within the time allowed by law. * * *

Judgment reversed, in so far as it allows a recovery for the installment due August 9, 1903; otherwise, affirmed.

TORBERT v. MONTAGUE.

(Supreme Court of Colorado, 1906. 38 Colo. 325, 87 Pac. 1145.)

MAXWELL, J.[7] A trial to the court below, without a jury, resulted in a judgment against appellant as indorser upon three promissory notes. It is conceded that there was no presentment of the notes for payment, as required by section 70, p. 225, and no notice of dishonor, as required by section 89, c. 64, p. 228, of the Acts of 1897, "Negotiable Instruments" (3 Mills' Ann. St. Rev. Supp. §§ 245m, 247d). But it is claimed that there was a waiver of presentment and notice of dishonor under sections 82 and 109 of the above statute. * * *

Over defendant's objection plaintiff's husband, who was acting as her agent in the matter, was allowed to testify, in substance, that at the time the notes were indorsed and delivered to witness by Mr. Fowler, of the firm of Torbert & Fowler, of which firm appellant was a member, Mr. Fowler said, quoting from the abstract of the record: "That they [meaning Torbert & Fowler] would be responsible for the interest and the principal when it becomes due; that I would have nothing to do whatever with the collection of the note, or the principal of it; that they would look after the collection of the note when it became due and pay me the interest when it became due"; and that the same statement was substantially repeated several times thereafter prior to the maturity of the notes. A motion to strike out all of this testimony interposed by defendant's counsel was overruled, and an exception saved.

There is evidence in the record to the effect that Torbert & Fowler were conducting a chattel loan and business chance business in the city of Denver; that the notes upon which this suit was brought were indorsed by Mr. Fowler in the name of Torbert & Fowler at the time they were delivered to appellee's agent; that the firm of Torbert & Fowler managed and conducted the entire business for appellee, collecting and paying over to her the installments of interest as they fell due and a portion of the principal of one of the notes, which seems to have been realized from the foreclosure of a chattel mortgage given to secure the note upon which a partial payment was made. In short, the evidence tends to prove that Torbert & Fowler were acting as the agents of appellee in the matter. Appellant did not introduce any evidence.

The judgment of the court, set forth in full in the abstract, conclusively shows that it was based, in part at least, upon the testimony of the witness as to a parol agreement made contemporaneously with the indorsement of the notes to appellee. It is settled in this state that the legal effect of a blank indorsement, which was the indorsement upon the notes sued upon in this action, cannot be varied by parol. Martin

[7] Part of the opinion is omitted.

v. Cole, 3 Colo. 113; Dunn v. Ghost, 5 Colo. 134; Doom v. Sherwin, 20 Colo. 234, 38 Pac. 56. This being the rule, all testimony as to a parol agreement between the indorser and the indorsee contemporaneous with the indorsement of the note sued upon was incompetent, and should have been rejected.

It is insisted by appellee that there is sufficient evidence in the record, exclusive of the incompetent testimony above referred to, to support the finding of the court to the effect that there was a waiver of presentment for payment and notice of dishonor. As seen above by sections 82 and 109 of the negotiable instrument statute presentment for payment and notice of dishonor may be waived, and the waiver may be express or implied.

Appellant concedes this to be the law, but insists that the testimony relied upon, which is quoted from the abstract, supra, does not prove a waiver. The findings of the court were as follows: "I am compelled to find, from the evidence in the case, that the evidence discloses the fact that the conduct and promises and manner of transacting the business by the firm, on the part of Mr. Fowler, at that time misled and caused the plaintiff to rely upon those promises and upon that course of conduct, to the extent that she left the matter entirely to the firm of Torbert & Fowler to attend to the collection and take charge of the matter, and that the evidence discloses they got their pay for it and got their commission on this matter, and undertook the responsibility of doing it, and that was the cause, under the evidence at least, for the failure on the part of the plaintiff to present these notes and give any further notice of dishonor." * * *

The question to be determined is whether, upon a fair construction of the language used by Fowler, his conduct in relation to the matters in controversy, and his acts as agent of appellee, were calculated to mislead appellee, to put her off her guard, and to induce her to forbear taking the necessary steps to charge appellant as indorser. In Union Bank v. Magruder, 7 Pet. 287, 8 L. Ed. 687, the United States Supreme Court, according to the headnote, held: "Whether certain declarations by the indorser of a note amounted to a waiver of demand on the maker and notice to the defendant, or to a new promise in consideration of forbearance, are questions of fact for the jury, under instructions from the court, not mere questions of law." Declarations intermixed with acts and conduct, as in this case, seem to us to raise a question of fact to be determined by the court or jury. So the rule is stated by Daniel, § 1103, and Randolph, § 1383, quoted above. The court below found this fact against the appellant, and we do not feel at liberty to disturb it.

In view of all the circumstances surrounding this case, as disclosed by the transcript of the evidence, which has been read with great care, the judgment will be affirmed.

CHECKS

I. Presentment and Notice of Dishonor—Effect of Delay [1]

MORRISON v. McCARTNEY.

(Supreme Court of Missouri, 1860. 30 Mo. 183.)

NAPTON, J.[2] This was a suit by Morrison & Lackland upon a check payable in currency, drawn by the defendant upon E. W. Clark & Bros., bankers in St. Louis, in favor of Bohn & Co., and indorsed to plaintiffs. The check was dated and delivered to Bohn & Co. on the 2d of October, 1857, and transferred by indorsement to the plaintiffs on the same day. It was not presented to the drawees until the 29th of January, 1858, when payment was refused, and it was duly protested and notice given to the defendant. It appears that, about 3 o'clock of the 3d of October, the house of Clark & Bros. was closed or stopped payment; but on the 6th of October, 1857, the defendant, who had previously commenced suits by attachment, compromised these suits, settled with Clark & Bros., and withdrew his deposits. The question in the case was whether the plaintiffs were entitled to recover, notwithstanding their failure to present the check on the day after it was indorsed to them, upon showing that the drawer sustained no injury by the delay, and that before suit brought, and within a reasonable time, demand, protest, and notice were duly given.

The law on this subject is stated in Kent's Commentaries as follows: "The drawer of a check is not a surety, but the principal debtor, as much as the maker of a promissory note. The check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of his banker to the holder of the check, and there it ought to remain till called for; and unless the drawer actually suffers by the delay, as by the intermediate failure of his banker, he has no reason to complain of delay not unreasonably protracted. If the holder does so unreasonably delay, he assumes the risk of the drawee's failure, and he may, under circumstances, be deemed to have made the check his own to the discharge of the drawer. But this is quite distinct from the strict rule of diligence applicable to a surety, in which light stands the indorser, who has a right to require diligence on the part of the holder to relieve him from responsibility." 4 Kent, 549.

[1] For discussion of principles, see Norton on Bills and Notes (4th Ed.) § 150.

[2] The statement of the case, the arguments of counsel, and part of the opinion are omitted.

This view of the law is adopted by Judge Story in the chapter, in his work on Promissory Notes, devoted to the subject of checks.

His language is that "the drawer [of a check] will at all times be liable to pay the same if the holder can show that the drawer has sustained and can sustain no loss or damage from the omission to demand payment, at an earlier date, of the bank or banker on whom the check is drawn." "In case of a check," says Judge Story, "the drawer is treated as in some sort the principal debtor, and he is not discharged by any laches of the holder in not making due presentment thereof, or in not giving him notice of the dishonor, unless he has suffered some loss or injury thereby, and then only pro tanto." Story on Prom. Notes, 492.

The same doctrine is maintained in the most recent decisions of the highest courts of New York. Little v. Phenix Bank, 2 Hill, 425. The opinion of Judge Cowen, in Harker v. Anderson, 21 Wend. 372, has not been sustained. In a word, this opinion appears to prevail generally both in England and in the United States, where the question has arisen. Alexander v. Burchfield, 3 Scott, N. R. 558; Robinson v. Hawkeford, 9 Q. B. 52; Byles on Bills, 14, and note 2.

The justice and policy of the rule are sufficiently obvious, and are forcibly alluded to and illustrated by Judge Story, in his opinion in the Matter of Brown, 2 Story, 516: "If the drawee, upon the presentment, refuses to pay the check because he has no funds, then the drawer is not injured; and if he has funds, and refuses to pay, then, if the bank is still in good credit, as the drawer has sustained and can sustain no loss, there is every reason to hold him liable therefor. Every check is prima facie presumed to be given for value received by the drawer; and if, by reason of the want of due presentment or want of due notice of the dishonor, he is to be totally exonerated, he pockets both the original consideration and his funds in the hands of the bank or banker. In such a case, can it be said, with truth or justice, that he is to be enriched at the expense of the holder of the check? or that he shall not be deemed to hold the money as money had and received for the use of the holder, either because he had no funds in the bank or because he still retains those funds appropriated to the use of another for his own use?"

The argument seems to be conclusive. Whether it is not just as applicable to bills of exchange is another question not necessary to be considered. See Edwards on Bills, p. 396.

In the case of St. John v. Homans, 8 Mo. 382, decided by this court in 1844, the judgment turned upon the fact of a loss to the drawer of the check. An opinion was expressed that the weight of authority recognized no distinction between the degrees of diligence required in checks and bills of exchange in determining the responsibility of the drawer. However that may have been at that time, the current of authority now is, as we have seen, decidedly the other way. * * *

Judgment affirmed.

II. Certification [3]

FIRST NAT. BANK OF JERSEY CITY v. LEACH.

(Court of Appeals of New York, 1873. 52 N. Y. 350, 11 Am. Rep. 708.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, affirming a judgment in favor of defendant, entered upon a verdict.

This action was brought upon a check drawn by defendant. The check was drawn upon the Ocean National Bank, was dated November 21, 1871, for $1,410, payable on the 12th December, 1871, to the order of James Dolby. It was delivered to the payee and discounted for him by plaintiff. At 11 o'clock a. m. of the 12th December, plaintiff caused the same to be presented to the drawee for certification, and it was certified as good. The drawer had at that time on deposit sufficient to pay the check, and the amount thereof was charged to him. Within an hour or two thereafter the Ocean National Bank, the drawee, suspended, and a receiver was appointed, who took possession afterward. Upon the same day the check was presented for payment, and payment being refused, the same was duly protested.

Upon this state of facts the court directed a verdict for defendant, to which plaintiff's counsel duly excepted.[4]

PECKHAM, J. The defendant drew the check in controversy, it was discounted by the plaintiff, and on the day it was due it was presented by plaintiff to the drawee, the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused, because between the time of its certificate and its second presentment the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check as between these parties?

The theory of the law is that, where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself.

The reason therefor is so strong that the law presumes it is adopted by the banks. Smith v. Miller, 43 N. Y. 171, 3 Am. Rep. 690; Meads v. Merchants' Bank of Albany, 25 N. Y. 148, 82 Am. Dec. 331; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125, 69 Am. Dec. 678; Merchants' Bank v. State Bank, 10 Wall. 647, 19 L. Ed. 1008. It is found to have been done in this case.

[3] For discussion of principles, see Norton on Bills and Notes (4th Ed.) §§ 153–155.

[4] The arguments of counsel are omitted.

If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to bona fide holders, whether it had funds or not. Farmers' & Mech. Bank v. Butchers' & Drovers' Bank, supra.

It follows that, after a check is certified, the drawer of the check cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified; as to him, it was precisely as if the bank had paid the money upon that check instead of making a certificate of its being good.

For that reason, the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of that check. Hence, if the drawer should get the check back, he would strictly be entitled to get that money, not by virtue of his original deposit, but solely by surrender of the certified check, like any other holder.

But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then, when the drawee accepts, it is an appropriation of the funds, pro tanto, for the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. Story on Bills of Ex. § 14; 1 Pars. on Notes and Bills, 323.

It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says: "That check is good; we have the money of the drawer here ready to pay it; we will pay it now, if you will receive it." The holder says: "No, I will not take the money; you may certify the check and retain the money for me until this check is presented."

The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer.

The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the statute of limitations.

The acceptance of a time draft before due is entirely different; there the holder has then no right to the money, and the acceptor no author-

ity to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such presentment, although the holder has the right to do it. The authority and the duty are to present for payment.

If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharging the drawer.

He cannot change the position and increase the risk of the drawer without discharging him. Smith v. Miller, supra.

This would not discharge the drawer of a check, who himself procured it to be certified and then put it in circulation. The reason of the rule fails to apply to him in such case.

I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the check.

The judgment must be affirmed.

BORN v. FIRST NAT. BANK.

(Supreme Court of Indiana, 1890. 123 Ind. 78, 24 N. E. 173, 7 L. R. A. 442, 18 Am. St. Rep. 312.)

ELLIOTT, J. On the 30th day of January, 1886, the appellant was indebted to the appellee, and after 12 o'clock noon of that day he delivered to it a certified check drawn by him on Ritzinger's Bank, in which bank he then had money on deposit. The banks of the city of Indianapolis had a long-established rule requiring all checks presented after 12 o'clock noon to be certified by the bank upon which they were drawn, and it was the well-known custom of such banks to immediately charge the checks certified by them against the depositor. This was done in this instance, and the amount of the check was set aside for the purpose of paying it. Ritzinger's Bank suspended payment, and made a voluntary assignment for the benefit of creditors, prior to the business hours of the first day after the check was delivered to the appellee.

We agree with the appellant's counsel that the drawer of a check is released if the holder, instead of presenting it for payment himself, procures it to be certified by the bank upon which it is drawn. If the holder elects to procure the certification of the check, it becomes, in his hands, substantially a certificate of deposit. By his own act he makes the bank his debtor, and releases the drawer of the check. The reason for this rule is that the moment the check is certified the funds cease to be under the control of the original depositor, and pass under the control of the person who procures the certification of the check drawn in his favor. First Nat. Bank v. Leach, 52 N. Y. 350, 11 Am.

Rep. 708; Thomson v. Bank, etc., 82 N. Y. 1; Girard Bank v. Bank of Penn. Tp., 39 Pa. 92, 80 Am. Dec. 507; Freund v. Importers', etc., Bank, 76 N. Y. 352. It is true that the bank by which the check is certified becomes bound for its payment, and that it cannot defeat the right of the holder upon the ground that the drawer has no funds on deposit. Espy v. Bank of Cincinnati, 18 Wall. 604, 21 L. Ed. 947.

But it is very clear that the authorities to which we have referred do not directly rule this case, for here the holder did not procure the certification of the check. All that it did was to accept the check in the ordinary course of business. Nor do we regard this case as within the sweep of the reasoning of the courts in the cases to which reference has been made. Here the holder accepted the check as it was offered, and did nothing to make the drawee its debtor. The principle which gives force and strength to the decisions referred to fails entirely where there is no act done by the holder of the check save that of receiving it in the form in which it is presented; for the element which sustains those decisions is that the holder, by procuring the certification of the check after he becomes the owner, voluntarily makes the bank upon which it is drawn his debtor, thus releasing the drawer. It is, in such a case, the holder's own act that changes the relation and situation of the parties.

The certification of a check does not completely change its character; on the contrary, it changes it only in one particular, although the change, it is true, does produce a difference in the relation of the original parties, inasmuch as the drawee ceases to be the debtor of the drawer for the amount represented by the check. But this is the extent of the change in the situation of the respective parties in all cases where the certification is not procured by the holder of the check after it passes into his hands. It remains an order for the payment of money, and the certification, when made before delivery, operates in favor of third parties simply as an assurance that it is genuine, and will be paid. The bank that certifies it becomes bound, but beyond this nothing is added to the legal force or effect of the instrument, except, as we have said, in cases where the holder himself procures its certification.

The party who accepts a certified check in the usual course of business is not bound to take the risk of the solvency of the bank upon which it is drawn. He is bound only to do what the law requires, and that is to promptly and seasonably present the check for payment. A party to whom a debt is owing has a right to demand payment of his claim in money; for, in the absence of an express agreement, payment can only be made in money. Hancock v. Yaden, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396. In accepting a check instead of money, the creditor dispenses with the necessity of payment in the legal mode, and the reasonable implication is that the check shall

be a payment only in the event that it is honored on presentation. To hold otherwise would, as the Supreme Court of the United States has suggested, seriously interfere with commercial and financial transactions, and break down an established system. Merchants' Bank v. State Bank, 10 Wall. 604, 19 L. Ed. 1008. Nor is there any rule of law which requires it to be so held. The analogies are, indeed, the other way; for, as only money is payment where there is no express agreement, there is no sufficient reason for inferring that an order for money, although accepted, is money, or has the same effect as money.

A bank upon which a check is drawn is not liable upon the check unless it is certified as good. Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805. The certification fixes the liability of the bank, but it does no more. It does not change the situation of the party who takes the check, nor does it make the check money. As it is not money, but is simply an accepted order for money, it does not, of its own force and vigor, operate as money. A certified check cannot take the place of money without an express agreement to that effect, and therefore, cannot by its own intrinsic force operate as payment. To make it a payment, something must be added; and that something must be an agreement, express or implied, that it shall be regarded as money, the legal medium of payment.

The obvious purpose of certifying checks is to assure the persons to whom they are offered that they are genuine, and will be paid; not that the bank that certifies them is solvent. There is nothing in the nature of the transaction that suggests, in the faintest degree, that certification is evidence of the solvency and ability of the drawee. It is perfectly clear that the certification of a check means simply that the bank upon which it is drawn will honor it, and there is no reason for implying that one who receives it in the usual course of business does so upon the faith that the certification implies that the bank is both willing and able to pay it. The certification is not intended to convey information as to the solvency of the bank. None of the parties can be regarded as giving it that force; and, if not, then it cannot be inferred that any of them agreed that the certification of the check impressed it with the character of money. We suppose that no one who accepts a certified check gives a thought to the question of the solvency of the bank upon which it is drawn other than such as he would give if there were no certification; for it would be unnatural and unreasonable to do so, inasmuch as the certification is, in terms and in implication, no more than an agreement that the check will be paid on presentation. It neither represents nor touches the question of the solvency of the bank upon which it is drawn. There is, therefore, no just reason for concluding that the party who takes a certified check in the ordinary course of business assumes the risk of solvency of the bank chosen by the drawer of the check as his place of deposit. The fair and reasonable implication is that the party who selects for

himself the bank which he will trust with his money assumes the risk of its solvency.

The certification of a check is not intended to convey to the person to whom it is offered an assurance that the bank upon which it is drawn is solvent; for there is nothing in the nature of the transaction, nor in the form of the contract, which authorizes the inference that any of the parties expected, or intended, that it should have that effect. It cannot, therefore, be implied that the acceptance of the check by the creditor, ipso facto, released the drawer, and imposed upon the creditor the risk of the solvency of the bank by which the check was certified.

It is, and long has been, settled law that an ordinary check does not constitute payment. This doctrine is so well settled that it is unnecessary to refer to the authorities. Accepting, as we must, this rule as obligatory, we cannot conclude that a certified check constitutes payment, unless we assume that the certification makes it the equivalent of money as a medium of payment. But neither in principle nor authority is there to be found warrant for this assumption; for, as we have seen, the nature of a check is not changed by certification, except in the one particular already indicated. As there is no other change, it is logically impossible that the effect of that change can make the check the equivalent of money.

From whatever point of view the question is examined, it appears clear that there is no release of the drawer of the check unless there is either an express or an implied agreement to that effect.

There is scant authority upon the direct question. The reason for this barrenness is that the use of certified checks is of modern origin. But, scarce as the authorities are, our conclusion that a certified check does not of its own force and vigor operate as a payment, is not without support from the decided cases. In Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436, it was expressly decided that a certified check does not constitute payment. To the same effect are the decisions in Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 43 Ill. 497; Mutual Nat. Bank v. Rotge, 28 La. Ann. 933, 26 Am. Rep. 126; Andrews v. Bank, 9 Heisk. (Tenn.) 211, 24 Am. Rep. 300. The question received consideration in the recent case of Larsen v. Breene, 12 Colo. 480, 21 Pac. 498, and it was held that a certified check was not a payment. This general doctrine is asserted by Mr. Tiedeman, who says: "And the same rule applies although the check had been certified before its delivery to the payee or holder; the certification only having the effect in that case of increasing its currency by adding the liability of the bank to that of the drawer." Tiedeman Com. Paper, § 456.

There was no substitution of one debtor for another, in this instance, and the contention of appellant's counsel that there was a novation cannot prevail. The delivery of the check was simply a conditional payment. The release of the original debtor was dependent upon the

condition that the check should be honored on presentation. He still remained the debtor, for he was bound for the debt as long as the check remained unpaid. Culver v. Marks, 122 Ind. 554, 23 N. E. 1086, 7 L. R. A. 489, 17 Am. St. Rep. 377.

Judgment affirmed.

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